File Number: 33581

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

THE LAX KW'ALAAMS INDIAN BAND, REPRESENTED BY CHIEF COUNCILLOR GARRY REECE ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE LAX KW'ALAAMS INDIAN BAND, AND OTHERS

Appellants
(Appellants)

AND:

THE ATTORNEY GENERAL OF CANADA AND HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Respondents
(Respondents)

AND:

THE ATTORNEY GENERAL OF ONTARIO, METLAKATLA BAND, B.C. WILDLIFE FEDERATION AND B.C. SEAFOOD ALLIANCE, GITXAALA NATION and TE'MEXW TREATY ASSOCIATION

Interveners

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PART I – STATEMENT OF FACTS

I. OVERVIEW

1. The trial judge, Satanove J., found that the appellants' ancestors fished eulachon in late winter at the mouth of the Nass River to process into oil to trade with other Aboriginal groups; however, their trade of other fish, including salmon, was "low volume, opportunistic, irregular, for food, social and ceremonial purposes, and incidental to fundamental pre-contact Coast Tsimshian kinship relations, potlatch and ranked society."[1] The essential question before this Court is whether these practices entitle the appellants to a constitutionally protected Aboriginal right to fish any species of fish, throughout a large area, for sale on a commercial scale. In concluding that they do not, Satanove J. correctly applied the test this Court established in *Van der Peet* and re-affirmed in *Sappier*.[2]

2. Contrary to the appellants' argument, this Court has consistently maintained the *Van der Peet* analysis and the appellants offer no compelling reason to change it. That analysis was founded on the purpose of s.35(1) of the *Constitution Act, 1982* and on its role in granting special constitutional protection to one part of Canadian society, both of which require that Aboriginal rights are defined in a way that captures their "Aboriginal" component.[3] To suggest as the appellants do, that the modern commercial fishing right they claim flows from their ancestral way of life, is to lose sight of the unique role and significance of the eulachon oil trade and the very different role and significance of exchange of other species to the Coast Tsimshian way of life.

3. Further, the appellants misinterpret this Court's decisions in *Marshall; Bernard*[4] and *Sappier* in arguing that Satanove J. should not have restricted her analysis to the particular right raised by their pleadings of fishing for commercial sale. In a civil action, the court should resort to the pleadings to determine the nature and scope of the right claimed and thus the precise issue to be adjudicated, along with infringement and justification if those issues arise, to resolve the dispute. Rights to fish for sale on a lesser scale or for food, social and ceremonial ("FSC") purposes were not pled or raised until final oral argument and Satanove J. properly refused to consider them. In any event, the potlatch practice does not support a right of sale at a moderate or any other level.

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[1] Reasons for Judgment of Satanove J., British Columbia Supreme Court, April 16, 2008 [BCSC Reasons], para 496 (Appellants' Appeal Record [AR] Vol I Tab 2 p 168).
[2] *R v Van der Peet*, [1996] 2 SCR 507, paras 18-21, 31, 43-44, 51, 53, 63; *R v Sappier; R v Gray*, [2006] 2 SCR 686, 2006 SCC 54, paras 20-24, 40, 48.
[3] *Van der Peet*, paras 18-20.
[4] *R v Marshall; R v Bernard*, [2005] 2 SCR 220, 2005 SCC 43.

4. The appellants' alternative argument that the reserve creation process gave rise to an obligation on the Crown to give them preferential access to commercial fishing cannot be sustained in the face of Satanove J.'s finding of fact that the Crown did not give any promise of commercial fishing rights.[5]

II. APPELLANTS' STATEMENT OF FACTS

5. Except where otherwise stated, the Attorney General of Canada ("respondent") generally agrees with the appellants' statement of facts. Additional relevant facts are set out below.

III. THE TRIAL PROCESS FOCUSED ON A COMMERCIAL FISHING RIGHT

A. The Pleadings

6. After the original Statement of Claim was filed in 2003, the respondent sought extensive particulars about the nature and scope of the appellants' claims. The appellants provided Particulars a year later then filed an Amended Statement of Claim (ASOC) in 2005, by consent.[6] The ASOC was amended a second time before the trial began by an Order of Satanove J. that severed the Aboriginal title and fiduciary duty claims against the Province of British Columbia.[7] The appellants did not seek any further amendments.

7. In their ASOC the appellants sought declarations that they have Aboriginal rights to (1) harvest all species of fisheries resources and (2) sell those fisheries resources on a commercial scale, and that the *Fisheries Act* and regulations promulgated thereunder infringe those rights. Alternatively, they sought a declaration that Canada breached a fiduciary obligation by restricting or denying their ability to harvest fisheries resources for commercial purposes.[8] In their Particulars, they defined "commercial scale" as "large scale" exchange, limited only by the requirements of conservation.[9] The appellants did not seek declarations of any other rights.

8. In support of their claim, the appellants pled that they traded fish resources and products "to sustain their communities, accumulate and generate wealth and maintain and develop their

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[5] BCSC Reasons, para 518 (AR Vol I Tab 2 p 175).
[6] Plaintiffs' Amended Responses to Canada's Request for Further and Better Particulars, May 5, 2004 [Particulars], (AR Vol. II Tab 10); Plaintiffs' Amended Statement of Claim, September 29, 2005 [ASOC] (AR Vol II Tab 8).
[7] This resulted in a redacted form of the ASOC, appended to the September 11, 2006 Order of Satanove J., (AR Vol II Tab 14). This is the version of the ASOC which governed the conduct of the trial and the appeal to the BCCA.
[8] ASOC, para 95 (AR Vol II Tab 14 pp 214-215).
[9] Particulars, para 54(d) (AR Vol II Tab 10 p 134).

economy".[10] They described "sustaining the community" as requiring sufficient fish resources to "maintain a prosperous economy".[11] The alleged infringements in the ASOC also focus on restrictions on commercial fishing.[12] The appellants' pleadings make no mention of potlatch exchange as a pre-contact practice that supports a modern day right to harvest and sell fish resources on a smaller scale than commercial.

9. The respondent joined issue on this basis, denying that the appellants have Aboriginal rights "to harvest, manage and trade on a commercial scale any Fisheries Resources available from the Band Claim Area," but did not address other Aboriginal rights.[13]

B. The Experts and the Conduct of the Trial

10. The retainer letters to the appellants' experts, Dr. MacDonald, Dr. Langdon and Mr. Inglis, ask for information relevant to the claim that the Lax Kw'alaams' Aboriginal rights have been infringed by the respondent through restrictions on "access to fisheries for commercial purposes." The letters do not mention fishing for FSC purposes or potlatch exchange as a basis for a modern day right to sell fish at a moderate level.[14] The retainer letter to Dr. Anderson (which, unlike the others, was sent before the first Statement of Claim) refers more generally to trade, especially trade in fisheries resources.[15]

11. Consistent with their pleadings, in their opening submissions the appellants continued to focus on an alleged pre-contact practice of trade. Similarly, the respondent's opening submissions at trial refer only to fishing for commercial purposes.[16]

12. To prove their claim, the appellants called five expert witnesses and ten lay witnesses. Their expert witnesses were four anthropologists (Drs. MacDonald, Langdon and Anderson and Mr. Inglis)

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[10] Appellants' Factum [AF], paras 91-92; ASOC, paras 31, 62 (AR Vol II Tab 14 pp 196, 204); BCSC Reasons, para 94 (AR Vol I Tab 2 p 45).
[11] Particulars, para 57(c) (AR Vol. II Tab 10, pp 139-140).
[12] ASOC, para 71 (AR Vol I Tab 14 pp 206-208).
[13] Second Amended Statement of Defence of the Attorney General of Canada, May 22, 2007 [SASOD], para 26 (AR Vol II Tab 11 p 163).
[14] Ltr to Dr MacDonald dated June 14, 2005, Ex 10 (Attorney General of Canada's Appeal Record [AGCR] Vol III Tab 38 p 173); Ltr to Dr Langdon dated May 26, 2005, Ex 50 (AGCR Vol VI Tab 45 p 14); Ltr to Mr Inglis dated June 12, 2006, Ex 59 (AGCR Vol VI Tab 46 p 16).
[15] Ltr to Dr Anderson dated May 29, 2001, Ex 40 (AGCR Vol VII Tab 40 p 194).
[16] Plaintiffs' Opening Submissions (Written), 20 Nov 06 (AGCR Vol I Tab 2 p 2); Plaintiffs' Opening Submissions, 20 Nov 06 pp 1:38 to 46:45 (AGCR Vol I Tab 6 pp 127-172); Attorney General of Canada Opening Submissions (Written), 20 Nov 06 (AGCR Vol I Tab 3 p 78), 2 Apr 07(AGCR Vol I Tab 5 p 102); Attorney General of Canada

and a fisheries biologist (Dr. Vigers). Drs. MacDonald, Langdon and Anderson attempted to demonstrate large-scale pre-contact trade in fish resources and products.[17] The lay witnesses included Mr. Reece, the appellants' Chief Councillor. The respondent called three expert witnesses, an anthropologist (Dr. Lovisek) and two fisheries resource economists (Ms. James and Dr. Pearse). In reply, the appellants called another anthropologist (Dr. Archer).[18]

13. No evidence of a practice of trade on any scale to sustain their community was led; to the extent that evidence touched on aspects of pre-contact fishing for FSC purposes, it was not proffered or received as relating to a separate claim.[19]

14. In their final written argument, the appellants characterized their claim as the right to harvest fish resources for the purpose of selling those resources "on a commercial scale to sustain the Lax Kw'alaams community and accumulate and generate wealth."[20] It was not until their final oral submissions, after over 100 days of trial, that the appellants attempted, for the first time, to recast their claim as a right to harvest all species of fish resources for all purposes. The respondent objected.[21]

IV. COAST TSIMSHIAN WAY OF LIFE

A. Social Organization

15. The appellants are the descendants of ten pre-contact Coast Tsimshian tribes.[22] They lived in permanent winter village sites in the area of what is now Prince Rupert Harbour on the coast of northwest British Columbia and in summer villages located on the Skeena tributaries.

16. Pre-contact, there was no cohesive, or overarching, political Coast Tsimshian organization, although there were social bonds and relationships amongst clan members of different villages.[23]

Opening Submissions, 20 Nov 06, pp 47:10 to 62:27 (AGCR Vol I Tab 7 p 173-188), 2 Apr 07, pp 17:28 to 33:39 (AGCR Vol II Tab 22 p 59).

[17] BCSC Reasons, para 387 (AR Vol I Tab 2 p 135).

[18] BCSC Reasons, paras 59, 62, 77, 81 (AR Vol I Tab 2 pp 33-34, 40-42); Inglis, 5 Feb 07, p 6:7-9 (AR Vol III Tab 28 pp 80-82); Vigers, 15 Feb 07, para 5 (AGCR Vol I Tab 4 p 98); James, 7 Jun 07, pp 7:12 to 8:3 (AGCR Vol II Tab 31 pp 108-109); Pearse, 25 Jun 07, p 14:4-9 (AGCR Vol II Tab 35 p 138); Archer, 9 Aug 07, p 49:18-21 (AGCR Vol II Tab 36 p 140).

[19] BCSC Reasons, paras 102, 107 (AR Vol I Tab 2 p 49-51).

[20] BCSC Reasons, para 87 (AR Vol I Tab 2 p 43).

[21] BCSC Reasons, paras 88, 101, 106 (AR Vol I Tab 2 pp 44, 48-49, 51).

[22] BCSC Reasons, para 491 (AR Vol I Tab 2 p 167).

[23] BCSC Reasons, para 160 (AR Vol I Tab 2 p 69).

Each of the ten tribes lived as an autonomous village group, being an organized social unit comprised of a number of different House groups that functioned under a village leader.[24]

17. House groups, inherited down matrilineal lines, were the basic organizational unit of Coast Tsimshian society.[25] Each House group had a territory, administered by the House Chief, from which its members could harvest land and marine resources.[26] A Coast Tsimshian person could fish from another House's or Aboriginal group's territory only with permission or if married to a member of that House or Aboriginal group.[27] The constituent House groups also shared rights to additional land in or near each village territory.[28]

18. Rank and wealth were inextricably tied to the social organization of the Coast Tsimshian.[29] Coast Tsimshian society used rank as a means to differentiate people into named positions of status and as a source of political authority.[30] Positions of rank were established at ceremonial feasts and potlatches ("major" feasts) through the confirmation of control over subsistence resource territories.[31] Ceremonial feasts involved a public recitation of *adaawx*, an "epic recounting of a family's quest for its own territories, acquisition of land, and defence of it",[32] which constituted an affirmation by witnesses of a statement of rights.[33] At these ceremonies, the Coast Tsimshian transferred *adaawx* from one generation to the next.[34]

19. Rank was also established at ceremonial feasts through the display and distribution of "wealth" through gifts to kin,[35] including surplus subsistence goods and exotic or luxury goods such as slaves, coppers, dentalium, eulachon oil, and beaver and animal skins.[36] These gifts were reciprocated by kin at later feasts.[37] The groups that hosted the most frequent and elaborate

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[24] BCSC Reasons, paras 134-135, 137 (AR Vol I Tab 2 pp 59-60).
[25] BCSC Reasons, para 128 (AR Vol I Tab 2 pp 57-58).
[26] BCSC Reasons, paras 220-221, 260, 265 (AR Vol I Tab 2 pp 85, 97-98).
[27] BCSC Reasons, para 221 (AR Vol I Tab 2 p 85); Anderson, 8 Jan 07, p 60:3-37 (AR Vol III Tab 24 p 55); Lovisek, 12 Jun 07, pp 38:43 to 39:03 (AGCR Vol II Tab 32 pp 113, 114); Lovisek Report, Ex 259-1, pp 137-138 (AR Vol X Tab 104 pp 139-140).
[28] Lovisek, 14 Jun 07, p 69:32-45 (AGCR Vol II Tab 33 p 116).
[29] BCSC Reasons, para 192 (AR Vol I Tab 2 p 78).
[30] BCSC Reasons, paras 165, 169 (AR Vol I Tab 2 pp 70-72).
[31] BCSC Reasons, para 184 (AR Vol I Tab 2 p 75); Anderson, 24 Jan 07, pp 22:40 to 23:21(AR Vol III Tab 25 pp 58-59).
[32] BCSC Reasons, para 30 (AR Vol I Tab 2 p 22).
[33] BCSC Reasons, paras 30-31 (AR Vol I Tab 2 p 22).
[34] BCSC Reasons, para 32 (AR Vol I Tab 2 pp 22-23).
[35] BCSC Reasons, paras 164, 170, 183-184, 432 (AR Vol I Tab 2 pp 70, 72, 74-75).
[36] BCSC Reasons, paras 174, 179, 336, 347 (AR Vol I Tab 2 pp 72-73, 119, 122-123).
[37] BCSC Reasons, paras 295, 305 (AR Vol I Tab 2 pp 108, 111).

ceremonies and that displayed and distributed the greatest amounts of wealth were invariably the highest ranked.[38] Any trade was "personal and was negotiated between kin structured relations on a clan basis of familial relationships."[39] Thus, the Coast Tsimshian engaged in some amount of "loosely termed trade" in the form of "gift exchange between kin at feasts and potlatches".[40] All trade in subsistence fish resources was "incidental to fundamental pre-contact Coast Tsimshian kinship relations, potlatch and ranked society."[41]

20. The respondent disagrees with the appellants' description of the functions of the potlatch, which they base on extracts from the work of Dr. Kalervo Oberg.[42] Dr. Oberg was not a witness at the trial, though portions of his work were referenced by some of the expert witnesses. Dr. Oberg was an anthropologist whose focus of study was the Tlingit, not the Coast Tsimshian. Both parties' experts noted that Dr. Oberg's work could not be adopted as entirely applicable to the Coast Tsimshian because there were differences between the Coast Tsimshian and Tlingit societies.[43] Dr. Lovisek also cautioned that it is not always possible to determine if Dr. Oberg's descriptions of Tlingit society relate to pre-contact or post-contact developments.[44] However, even his conclusions, as summarized by Dr. Lovisek, were:

> Oberg distinguished between gift exchange, which takes place between a network of social relationships, and barter or trade in which individuals seek their own advantage through bargaining, without the benefit of a social relationship.[45]

B. Seasonal Round

21. In general terms, the respondent agrees with the appellants' description of the seasonal round, but disagrees with their characterization of aspects of the Coast Tsimshian way of life. [46]

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[38] BCSC Reasons, para 165 (AR Vol I Tab 2 p 70).
[39] BCSC Reasons, para 290 (AR Vol I Tab 2 p 106).
[40] BCSC Reasons, para 495 (AR Vol I Tab 2 p 168).
[41] BCSC Reasons, paras 486, 495-496 (AR Vol I Tab 2 pp 166, 168).
[42] AF para 15.
[43] Lovisek, 22 Jun 07, pp 9:24 to 10:03, p 11:25-30, pp 11:31 to 12:06, pp 12:39 to 13:07, p 13:08-34, pp 14:26 to 16:28, pp 27:28 to 28:18, pp 30:16 to 31:07, pp 34:16 to 35:03 (AGCR Vol II Tab 34 pp 118-125, 130-131, 133-136); Anderson, 25 Jan 07, p 85:13-15, p 86:28-45, pp 87:39 to 88:37 (AR Vol III Tab 26 pp 67-70).
[44] Lovisek, 22 Jun 07, pp 10:40 to 11:24, pp 11:45 to 12:06, pp 18:10 to 21:11, pp 29:24 to 31:07 (AGCR Vol II Tab 34 pp 119-121, 126-129, 132-134).
[45] Lovisek Report, p 125 (AR Vol X Tab 104 p 127); BCSC Reasons, para 291 (AR Vol I Tab 2 p106). See also Lovisek, 22 Jun 07, pp 13:2 to 14:2(AGCR Vol II Tab 34 pp 122, 123).
[46] AF para 9.

22. Before contact with European fur traders, the Coast Tsimshian engaged in a seasonal round, in which they collected marine and other resources "from different ecological zones across the landscape".[47] In addition to being fishers, they were also hunters and gatherers.[48]

23. The seasonal round took the Coast Tsimshian to different sites at different times of the year. In the spring, they fished off the Dundas Island Group and trolled the first salmon of the year near their permanent village sites at Prince Rupert Harbour.[49] They collected seaweed, herring spawn and shellfish, and fished for halibut and other fish using tidal fish traps and other gear.[50] They also collected birds' eggs on islands just off the coast from Prince Rupert Harbour.[51]

24. In the summer, the Coast Tsimshian migrated to villages along the lower Skeena River tributaries to continue their catch of salmon and to trap, hunt and gather berries and other food resources, like roots, tubers and tree bark.[52] Their fishing gear, which consisted of traps and weirs, was ineffective in the Skeena mainstream so the Coast Tsimshian fished in its tributaries.[53]

25. In the summer and fall the Coast Tsimshian were able to collect a surplus of fish, which was dried and stored for later use. They also dried or preserved berries in grease for later use.[54] They used this surplus primarily for subsistence during the winter months at the permanent village sites.[55]

26. In the winter, the Coast Tsimshian supplemented their cache of dried fish by collecting shellfish from the coastal waters and tidal flats.[56] They also hunted a variety of animals for food and skins including deer, elk, mountain goats, sheep, mountain lions, lynx, bears, hares, raccoons, porcupines, marmots, seals, sea lions, otters, swans, geese, ducks and other waterfowl.[57]

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[47] BCSC Reasons, paras 148, 231 (AR Vol I Tab 2 pp 65, 88).
[48] BCSC Reasons, paras 251, 255, 229 (AR Vol 1 Tab 2 pp 94-95).
[49] MacDonald Report, Ex 7, pp 12, 15 (AGCR Vol III Tab 37 pp 14, 17); BCSC Reasons, para 218 (AR Vol I Tab 2 p 85).
[50] BCSC Reasons, paras 233, 236, 254, 270 (AR Vol I Tab 2 pp 88-89, 95, 100); MacDonald Report, pp 9-11 (AGCR Vol III Tab 37 pp 11-13); Lovisek Report, pp 26-27 (AR Vol X Tab 104 pp 28-29).
[51] BCSC Reasons, para 234 (AR Vol I Tab 2 pp 88-89); MacDonald Report, p 11 (AGCR Vol III Tab 37 p 13).
[52] BCSC Reasons, paras 143, 234, 492, 493 (AR Vol I Tab 2 pp 62, 88-89, 167); MacDonald Report, p 12 (AGCR Vol III Tab 37 p 14); Lovisek Report, pp 13, 15, 16 (AR Vol X Tab 104 pp 15, 17-18).
[53] BCSC Reasons, paras 208, 241 (AR Vol I Tab 2 pp 83, 91).
[54] MacDonald Report, p 12 (AGCR Vol III Tab 37 p 14); BCSC Reasons, para 351 (AR Vol I Tab 2 pp 123, 124).
[55] BCSC Reasons, paras 235, 322, 494 (AR Vol 1 Tab 2 pp 89, 115, 167-168).
[56] BCSC Reasons, para 236 (AR Vol I Tab 2 p 89); MacDonald Report, p 9 (AGCR Vol III Tab 37 p 11).
[57] MacDonald Report, pp 9-10 (AGCR Vol III Tab 37 pp 11-12); Lovisek Report, p 31 (AR Vol X Tab 104 p 33).

27. The above aspects of the seasonal round took place in areas controlled by Coast Tsimshian House groups or tribes.[58] In late winter, some members of the Coast Tsimshian travelled to the Nass River, in Nisga'a-claimed territory, for the eulachon run.[59] Others fished for halibut or hunted deer and birds elsewhere, while some remained in the permanent winter villages.[60]

28. Eulachon fishing, described in greater detail below, was key for both subsistence and trade purposes. Other than eulachon, the Coast Tsimshian fished for sustenance – not trade.[61] Salmon and other marine resources (apart from eulachon oil) were generally available to northwest coast Aboriginal groups and were not considered wealth items; thus, they were not in demand as trade goods. Trade of surplus, subsistence fish to other groups was rare and was for survival, not commercial purposes.[62]

C. Eulachon Fishing

29. Among the marine resources used by the Coast Tsimshian, eulachon were unique.[63] Although they were essential for subsistence purposes, the Coast Tsimshian also fished eulachon for the purpose of processing the fish into oil/grease that could be used as a preservative.[64] Rendering the eulachon into oil was a "unique ancestral practice".[65] Eulachon oil was a wealth item that brought

[58] BCSC Reasons, paras 159, 236, 492-3 (AR Vol I Tab 2 pp 68-69, 89, 167).
[59] BCSC Reasons, paras 222, 250, 493, 500 (AR Vol I Tab 2 pp 85-86, 93, 167, 169-170); Reasons for Judgment of Newbury, Chiasson and Bennett JJ.A., British Columbia Court of Appeal, December 23, 2009 [BCCA Reasons], paras 53-54 (AR Vol I Tab 5 p 213); Anderson, 12 Dec 06, p 42:41-43, p 43:33-42, p 44:13-23 (AGCR Vol I Tab 8 pp 190, 192); Anderson, 14 Dec 06, p 58:2-19 (AGCR Vol I Tab 9 p 194); Anderson, 15 Dec 06, p 4:5-31, pp 8:18 to 9:7, p 12:9-17, p 12:33-39, p 20:40-46, pp 21:29 to 22:16 (AGCR Vol I Tab 10 pp 196, 199-204); Anderson, 9 Jan 07, p 34:38-43, pp 37:22 to 38:7, pp 70:13 to 71:18 (AGCR Vol II Tab 11 pp 2-5); Anderson 10 Jan 07, pp 62:32 to 64:21 (AGCR Vol II Tab 12 pp 8-10); Anderson Report, Ex 38-1, p 19 (AR Vol V Tab 49 p 24); Seguin and Halpin, Ex 39-2, Tab 12, p 268 (AGCR Vol III Tab 39 p 177); Map, Ex 42 (AGCR Vol III Tab 41 p 196); Historical Atlas, Ex 47-1, Tab 6 (AGCR Vol IV Tab 42 pp 1-8); McNeary, Ex 47-1, Tab 8, pp 19-20 (AGCR Vol IV Tab 43 pp 10-11), Beynon, Columbia Manuscript, Ex 47-1, Tab 18, p 27 (AGCR Vol VI Tab 44 p 13); Mitchell and Donald, Ex 55-2, Tab 21, pp 20, 31 (AR Vol VI Tab 51 pp 169, 179); Reece, 23 Mar 07, pp 17:6 to 18:22 (AGCR Vol II Tab 20 pp 52, 53); Reece, 27 Mar 07, pp 13:10 to 16:8 (AGCR Vol II Tab 21 pp 55-58).
[60] BCSC Reasons, para 251 (AR Vol I Tab 2 p 94).
[61] BCSC Reasons, para 499 (AR Vol I Tab 2 p 169).
[62] BCSC Reasons, paras 178, 322, 428, 435 (AR Vol I Tab 2 pp 73, 147); BCCA Reasons, para 43 (AR Vol I Tab 5 p 209).
[63] BCSC Reasons, paras 178, 435, 499 (AR Vol I Tab 2 pp 73, 149, 169).
[64] BCSC Reasons, paras 225, 351, 499 (AR Vol I Tab 2 pp 86, 123-124, 169); Lovisek Report, p 28 (AR Vol X Tab 104 p 30).
[65] BCSC Reasons, paras 269, 499 (AR Vol I Tab 2 pp 100, 169).

prestige to the Coast Tsimshian. It was not "inter-related with the subsistence fishing of salmon" and other fish. [66]

30. Another distinction was that the Coast Tsimshian did not harvest eulachon from fishing sites within the territory over which they had control.[67] Satanove J. found that they did not occupy fishing sites along the Nass River and at Fishery Bay but had "usufructuary rights of access" only to the eulachon fishing grounds.[68] They were able to fish only eulachon, only at particular sites and only during the few weeks of the eulachon season.[69] Other Aboriginal groups, including the Tlingit, Southern Tsimshian, Kitkatla and Haida, also came to the Nass for the eulachon fishery.[70]

31. The Coast Tsimshian traded eulachon grease with interior Aboriginal groups for wealth items of value to them, including moose hides, groundhog pelts and moose meat.[71] Trade in luxury items, including eulachon grease, was integral to the Coast Tsimshian potlatch, and was integral to the distinctive Coast Tsimshian society.[72]

D. Contact

32. Although the first direct contact with the Coast Tsimshian was in 1793,[73] the evidence indicated that the Coast Tsimshian had already begun to experience the effects of Russian trade goods as early as 1700-1750.[74] They also had kinship and exchange ties with the Haida whose first European contact was in 1774. European traders reached the Southern Tsimshian as early as 1787 and by 1793, maritime fur traders were present during both summer and winter seasons trading European, American and Native goods to various Native groups.[75]

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[66] BCSC Reasons, paras 347, 499 (AR Vol I Tab 2 pp 122-123, 169); BCCA Reasons, paras 42-43 (AR Vol I Tab 5 p 209).
[67] BCSC Reasons, para 500 (AR Vol I Tab 2 pp 169-170).
[68] BCSC Reasons, paras 484-485, 493, 500 (AR Vol I Tab 2 pp 165, 167, 169-170); Anderson, 14 Dec 06, p 58:2-37(AGCR Vol I Tab 9 p 194), 15 Dec 06 pp 4:12 to 6:11 (AGCR Vol I Tab 10 pp 196-198), 8 Jan 07, p 58:30 to 59:12, p 60:13-37 (AR Vol III Tab 24 pp 53-55); 10 Jan 07, p 62:32 to 64:21 (AGCR Vol II Tab 12 pp 8-10); Beynon, Columbia Manuscript, p 27 (AGCR Vol IV Tab 44 p 13); Mitchell and Donald, p 31 (AR Vol VI Tab 51 p 180).
[69] BCSC Reasons, paras 222-224, 266, 493, 500 (AR Vol I Tab 2 pp 85-86, 98-99, 167, 169-170).
[70] BCSC Reasons, paras 222, 250, 500 (AR Vol I Tab 2 pp 85-86, 93-94, 169-170); MacDonald Report, p 8 (AGCR Vol III Tab 37 p 10).
[71] BCSC Reasons, paras 351, 352 (AR Vol I Tab 2 pp 123-124).
[72] BCSC Reasons, paras 435, 495 (AR Vol I Tab 2 p 149); BCCA Reasons, paras 36, 43 (AR Vol 1 Tab 5 pp 206-207, 209).
[73] BCSC Reasons, para 118 (AR Vol I Tab 2 p 54).
[74] BCSC Reasons, para 120 (AR Vol I Tab 2 pp 54-55).
[75] BCSC Reasons, paras 115-117 (AR Vol I Tab 2 pp 53-54).

33. The appellants state that the Coast Tsimshian traded salmon to Captain George Vancouver's crew on the first day of contact in 1793 as reported in Vancouver's Journal.[76] This brief passage in the Journal refers to a chance encounter with three Natives who were fishing salmon. The British explorers acquired some of the salmon with "looking glasses and other trinkets".[77] Prior to this exchange, a few Natives in five or six canoes with little to trade had visited Vancouver's ship near Point Maskelyne, which is at the entrance to Portland Inlet.[78]

V. THE RESERVE CREATION PROCESS

34. The appellants' interpretation of the reserve creation process in their factum[79] mirrors the interpretation they presented at trial.[80] Satanove J. described this interpretation of the facts as "notably one sided."[81] A plethora of historical documents show that it was clearly always Crown policy "that Indians were to have no special commercial rights over and above other fisherman."[82] There was also evidence that the Coast Tsimshian were advised of this policy and were well aware that their fishing interests would be treated "in common with those of white fishermen".[83]

35. After reviewing "the extensive historical record tendered by both parties",[84] Satanove J. found as a fact that "the Crown gave no promise of commercial fishing rights, exclusively or at all, to the Coast Tsimshian, nor is it reasonable for the Coast Tsimshian to rely on the allotment of their reserves as granting them such a right."[85] A brief glimpse of that record follows.

36. In 1872, just before the reserve creation process began, industrial commercial fisheries were almost non-existent in British Columbia.[86] Throughout the 1870s, the nascent industry grew quickly. On the Nass and Skeena Rivers, the Aboriginal food fishery and the canneries targeted entirely

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[76] AF para 17, footnote 75, Vancouver Journal, Ex 259-2, Tab 1, pp 121-126 (AR Vol X Tab 105 pp 225-230).
[77] Vancouver Journal, pp 125-126 (AR Vol 105 pp 229-230); Lovisek Report, p 52 (AR Vol X Tab 104 p 54).
[78] Vancouver Journal, p 122 (AR Vol 105 p 226); Lovisek Report, p 52 (AR Vol X Tab 104 p 54); BCSC Reasons, para 117 (AR Vol I Tab 2 p 54).
[79] AF paras 35, 123-126.
[80] BCSC Reasons, para 512 (AR Vol I Tab 2 p 173).
[81] BCSC Reasons, para 515 (AR Vol I Tab 2 p 174).
[82] BCSC Reasons, para 515 (AR Vol I Tab 2 p 174). See for example: Jan 30, 1882 Ltr from A/ Min. of Marine and Fisheries, Ex 283-5, Tab 114, pp 2-3 (AGCR Vol VI Tab 60 pp 92-93); Apr 5, 1898, Ltr from E. Prince, Dominion Comm. of Fisheries, Ex 283-7, Tab 250, pp 3-4 (AGCR Vol VI Tab 66 pp 120-121). See also *R v Nikal*, [1996] 1 SCR 1013, paras 31, 35; *R v Lewis*, [1996] 1 SCR 921, para 35.
[83] BCSC Reasons, para 517 (AR Vol I Tab 2 pp 174-175).
[84] BCSC Reasons, paras 508–518 (AR Vol I Tab 2 pp 172-175). Incl. docs. cited here at notes 84-96, and at AF notes 26-32.
[85] BCSC Reasons, para 518 (AR Vol I Tab 2 p 175).
[86] Annual Report of the Dept. of Marine and Fisheries for the year ending 30 June, 1872, Ex 71-1, Tab 8, p 177 (AGCR Vol IV Tab 47 p 23).

different salmon runs at different times of the year and at different locations.[87] However, pressure from the emergence of canneries gave rise to a need to protect "the different fishing grounds which have from 'time immemorial' afforded them the chief, and almost only, means of subsistence."[88]

37. Consistent with the reserve creation process throughout British Columbia,[89] Reserve Commissioner O'Reilly's objective was to reserve the land that had historically been used by the Nass and Tsimshian Indians for timber, agricultural or subsistence fishing purposes. He had no power to grant fishing rights.[90] In 1882 he reported that:

> … This tribe [Coast Tsimshian] has been liberally dealt with, their main Reserve embraces one hundred and ten square miles, besides which every patch of land used for the purposes of cultivation, and every fishing station claimed by them has been set apart for their use…[91]

38. From the outset of fishery regulation, the Department of Marine and Fisheries also consistently distinguished between the Aboriginal food fishery and the commercial fishery, each of which were regulated differently. By 1875, both were subject to licensing, but there was no fee for Aboriginal food fishery licences.[92] In 1878, express Ministerial instructions were provided to suspend the application of fishing enactments to Indians, "while fishing for their own use in their accustomed way". However, "where fishing with white men and with modern appliances, the Indians so fishing would be considered as coming in all respects under the general law."[93] In 1888, an Order in Council prohibiting salmon fishing without a licence was passed, expressly exempting Indian food

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[87] Supp. No. 2 to the 14th Annual Report of the Dept. of Marine and Fisheries for the Year 1881, Ex 71-2, Tab 38, pp 208-209 (AR Vol VII Tab 63 pp 197-198); Mar 25, 1882 Ltr from O'Reilly to Supt. Gen. of Indian Affairs, Ex 259-11, Tab 153, p 3 (AGCR Vol VI Tab 53 p 3).
[88] Apr 29, 1878 Ltr from Powell to Supt. Gen. of Indian Affairs, Ex 283-5, Tab 99 (AGCR Vol VI Tab 58 pp 77-87).
[89] Oct 14, 1974, Ltr from Douglas to Powell, Ex 283-5, Tab 89 (AGCR Vol VI Tab 56 pp 73-75).
[90] BCSC Reasons, para 516 (AR Vol I Tab 2 p 174); Aug. 25, 1876 Memo. of Instructions to the Dominion Commr on the B.C. Indian Land Question, Ex 71-1, Tab 14 (AGCR Vol IV Tab 48 pp 33-35); Dec 20, 1881 Ltr from Supt. Gen. of Indian Affairs to A/ Min. of Marine and Fisheries, Ex 283-05, Tab 111 (AGCR Vol VI Tab 59 pp 88-90); Jan 30, 1882 Ltr (AGCR Vol VI Tab 60 pp 91-97); May 26, 1892 Ltr from McNab to Deputy Min. of Marine and Fisheries, Ex 283-07, Tab 219 (AGCR Vol VI Tab 62 pp 108-109); Jun 4, 1892 Ltr forwarding McNab Ltr to Deputy Supt. Gen. of Indian Affairs, Ex 283-07, Tab 221 (AGCR Vol VI Tab 63 p 10); Jun 4, 1892 Ltr from R. Sinclair, Ex 120 (AGCR Vol IV Tab 49 pp 36-38); Jul 14, 1892 Ltr from Deputy Min. of Marine and Fisheries to Supt. Gen. of Indian Affairs, Ex 283-07, Tab 222 (AGCR Vol VI Tab 64 pp 111-115); Jan 13, 1898 Memorandum, Ex 283-07, Tab 245 (AGCR Vol VI Tab 65 pp 116-117), Apr 5, 1898 Ltr (AGCR Vol VI Tab 65 pp 120-121). See also *Nikal*, paras 43, 45, 46, 59, 60.
[91] BCSC Reasons, para 510 (AR Vol I Tab 2 p 172); Oct 25, 1882 Ltr from Reserve Commr O'Reilly to Supt. Gen. of Indian Affairs Macdonald, Ex 283-5, Tab 135 (AGCR Vol VI Tab 61 pp 98-107).
[92] Dec 17, 1875 Dept. of Marine and Fisheries Circular, Ex 283-5, Tab 91 (AGCR Vol VI Tab 57 p 76).
[93] Reports of Fisheries Officers for 1878, Appendix No. 17, p 293, Ex 283-1, Tab 1A (AGCR Vol VI Tab 54 pp 6-29).

fishing, but not Indian fishing for "sale, barter or traffic".[94] As Satanove J. explained, the Crown's "administration of the fisheries has always had to take into account the rights of all Canadians to exploit this resource."[95]

VI. APPELLANTS' PARTICIPATION IN THE MODERN FISHERY

39. The respondent disagrees with the appellants' depiction of the impact on them of fisheries regulation since the late 1960s.[96] Far from being squeezed out of the commercial fishery, the appellants are significant participants. During the era of modern fisheries management in British Columbia, the appellants' share of commercial salmon fishing licences has increased from 1.5% of all salmon licences in 1973 to 3.3% of all salmon licences in 2003. In addition, the appellants' members held various commercial fishing licences for other species, giving them a total of 1.7% of all vessel-based commercial fishing licences in 2003, the year they filed the Statement of Claim.[97]

40. The appellants' level of participation is a reflection of various government programs and policies designed to facilitate overall Aboriginal participation in commercial fishing, including special or preferential licensing programs and millions of dollars in grants to Indians for fishing vessels, equipment and debt payments.[98]

41. At the same time, there is no doubt that the fishing industry as a whole, and the salmon fishery in particular, was contending with difficult financial circumstances in the 1990s and early 2000s. The salmon fishery was particularly hit hard by both reduced catches and reduced prices. Reduced prices for salmon have been brought about by increases in the world wide supply, largely from salmon farms. The reasons for the reduction in catches are complicated and diverse, including conservation management, overall fleet reductions, and environmental factors.[99] The negative financial impact was experienced by the fishing industry as a whole. However, the decline was not as extreme in areas

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[94] Annual Report of Dept. of Marine and Fisheries for 1888, Ex 283-1, Tab 6 (AGCR Vol VI Tab 55 p 36).
[95] BCSC Reasons, para 529 (AR Vol I Tab 2 p 178).
[96] AF paras 36–38.
[97] James Report, Ex 254-1, Tab A, pp 4, 51, 52 (AGCR Vol IV Tab 51 pp 55, 102, 103); James, 7 Jun 07, pp 20:39 to 21:19 (AGCR Vol II Tab 31 pp 110-111).
[98] James Report, pp 11-14, 18-20, 22-24, 30, 32-36, 38-43, 54 (AGCR Vol IV Tab 51 pp 62-65, 69-71, 73-75, 81, 83-87, 89-94, 105).
[99] James Report, pp 46-47 (AGCR Vol IV Tab 51 pp 97-98); Vigers, 19 Feb 07, pp 53:23 to 54:17, 54:33 to 56:05 (AGCR Vol II Tab 13 pp 14-17), 20 Feb 07, p 55:22-43, pp 62:03 to 64:07, p 65:18 to 67:41 (AGCR Vol II Tab 14 pp 19-25), 21 Feb 07, pp 10:08 to 12:14 (AGCR Vol II Tab 15 p 27-29), 22 Feb 07, pp 65:31 to 66:45(AGCR Vol II Tab 16 pp 33-34), 23 Feb 07, pp 7:28 to 12:19(AGCR Vol II Tab 17 pp 36-41); Peacock, 1 May 07, pp 16:23 to 17:44 (AGCR Vol II Tab 24 pp 82, 83).

3 and 4, where the appellants fish, as it was coast-wide. The area licensing scheme was a significant benefit from 1999 to 2002 for northern licence holders.[100]

42. Additionally, the Department of Fisheries and Oceans ("DFO") has issued communal Aboriginal FSC licences to the appellants since 1993. Initially, these licences were issued to the Tsimshian Tribal Council ("TTC"), of which the appellants were a part.[101] Later, when the appellants pulled out of the TTC, they received an annual multi-species communal FSC fishing licence directly.[102] DFO has continued to issue this annual licence, even though the appellants have declined to negotiate a fisheries agreement under the Aboriginal Fisheries Strategy. [103]

43. The appellants have not previously expressed any concerns about the adequacy of their FSC licences.[104] This, despite an express invitation having been extended to the Chief to contact DFO if he or the Band Council wished to "discuss and amend the communal licence".[105]

VII. THE TRIAL JUDGMENT

44. Satanove J. evaluated the appellants' Aboriginal rights claim by applying the three-part test laid out by this Court in *Van der Peet* and re-affirmed in *Sappier*. She began by characterizing the appellants' claim as an Aboriginal right to harvest and sell fisheries resources on a commercial scale.[106] She did so on the basis of the pleadings and the conduct of the trial.[107] She noted that at the characterization stage the question of whether the evidence supports the claim is irrelevant.[108] However, she deemed the following to be important in concluding that this was a case about a right to fish for commercial purposes only:[109]

a. the evidence about trade focused on "wealth, rank and kinship";

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[100] James Report, pp 47-48 (AGCR Vol IV Tab 51 pp 98, 99).
[101] James Report, pp 32-33, 35 (AGCR Vol IV Tab 51 pp 83, 84, 86).
[102] Reece, 16 Mar 2007, p 45:8-34 (AGCR Vol II Tab 18 p 44); Wagner, 4 Jun 2007, pp 7:25 to 8:31 (AGCR Vol II Tab 30 pp 103-104); Einarson, 15 May 07, p 34:23-37 (AGCR Vol II Tab 26 p 87); 16 May 07, p 34:19-37, p 36:12-26 (AGCR Vol II Tab 27 pp 92, 93); 17 May 07, pp 21:36 to 22:4, p 26:12-27 (AGCR Vol II Tab 28 pp 95-98); 28 May 07, pp 37:18 to 38:26 (AGCR Vol II Tab 29 pp 100-101); Radford, 18 Apr 07, p 14:20-25, p 18:7-25 (AGCR Vol II Tab 23 pp 78, 79).
[103] Reece, 16 Mar 2007, pp 47:45 to 48:16 (AGCR Vol II Tab 18 pp 46, 47).
[104] Reece, 16 Mar 07, p 46:43-46 (AGCR Vol II Tab 18 p 45); Wagner, 4 Jun 07, pp 9:9 to 10:2 (AGCR Vol II Tab 30 pp 105, 106).
[105] Ltr of Apr 12, 2006, Ex 128 (AGCR Vol IV Tab 50 pp 39-51); Reece, 20 Mar 07, p 60:3-19 (AGCR Vol II Tab 19 p 50); Einarson, 28 May 07, pp 37:18 to 38:26 (AGCR Vol II Tab 29 pp 100-101).
[106] BCSC Reasons, paras 86, 111 (AR Vol I Tab 2 pp 43, 52).
[107] BCSC Reasons, paras 90, 102-103 (AR Vol I Tab 2 pp 44, 49-50).
[108] BCSC Reasons, para 102 (AR Vol I Tab 2 pp 49-50).
[109] BCSC Reasons, para 107 (AR Vol I Tab 2 p 51).

b. neither party led evidence about a pre-contact practice of "sustaining the community through trade on any scale";

c. the evidence that "touched on" consumption was not called in support of a separate FSC claim;

d. the plaintiffs' theory of their case was not consistent with a claim for other rights;

e. a right to fish for FSC purposes was never put in issue until final submissions;

f. to characterize the claim as including a right to fish for FSC purposes would change "the complexion of the case from what was presented at trial"; and

g. it is not fair to introduce new issues during final submissions that were not the "subject of adjudication" during trial.[110]

45. After characterizing the right at issue, Satanove J. evaluated the substance of the claim. She found that the evidence relied upon by the appellants' experts, Drs. MacDonald, Anderson and Langdon, did not support their opinion that the Coast Tsimshian were large-scale traders in fish resources.[111] She further found that Dr. Anderson had formed a preconceived view that the appellants have an Aboriginal right to fish for commercial purposes and had grasped for evidence to support this view.[112] Satanove J. found the evidence of Canada's expert, Dr. Lovisek, to be "more reliable in most areas" than that of the appellants' experts.[113]

46. Satanove J. dismissed the appellants' claim for an Aboriginal right to harvest and sell on a commercial scale all species of fish in their claimed territories.[114] She found that pre-contact trade by the Coast Tsimshian in fish resources, other than eulachon grease, was "low volume, opportunistic, irregular, for FSC purposes and incidental to fundamental … kinship relations, potlatch and ranked society."[115] She held that "it would be stretching the concept of an evolved Aboriginal right too far to say that the Coast Tsimshian practice of trading in eulachon grease is equivalent to a modern right to fish commercially all species in their Claimed Territories."[116]

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[110] BCSC Reasons, paras 102-105, 107-108 (AR Vol I Tab 2 pp 49-51).
[111] BCSC Reasons, paras 61, 387, 401, 440 (AR Vol I Tab 2 pp 34, 135, 139, 151).
[112] BCSC Reasons, paras 66, 68, 74, 76, 85, 400-407 (AR Vol I Tab 2 pp 35-36, 38, 40, 43, 139-141).
[113] BCSC Reasons, para 83 (AR Vol I Tab 2 p 42).
[114] BCSC Reasons, para 503 (AR Vol I Tab 2 p 170).
[115] BCSC Reasons, paras 322, 435, 495-496 (AR Vol I Tab 2 pp 115, 149, 168).
[116] BCSC Reasons, para 501 (AR Vol I Tab 2 p 170).

47. Finally, Satanove J. found that the reserve creation process did not give rise to any Crown obligation of a fiduciary or trust-like nature to ensure that they have commercial fishing opportunities sufficient to earn a livelihood.[117]

VIII. THE BRITISH COLUMBIA COURT OF APPEAL

48. The Court of Appeal unanimously upheld Satanove J.'s decision. Contrary to the suggestion of the appellants, the Court of Appeal did not find that the pleadings were broad enough to permit Satanove J. to consider different rights.[118] Rather, the Court of Appeal stated that, on its face, the *phrase* "sustain the community" could encompass a variety of claims but that Satanove J. had properly considered the phrase in the context of the pleadings and the course of the litigation and had concluded that the "real issue" was the appellants' alleged commercial right.[119] The Court of Appeal held that Satanove J. was in the best position to determine what prejudice "Canada would suffer if she acceded to the appellants' late articulation of an intermediate right" and that she had properly exercised her discretion.[120] The Court held that it is not appropriate to expect a court to "piece together various obscure references in a pleading" in order to determine what remedy a party seeks.[121]

49. The Court of Appeal did not address the question whether characterizing the claim should be done on the basis of the pleadings or the evidence. This is the first issue the appellants raise in this Court, but they did not raise it in the Court of Appeal.[122]

50. The Court of Appeal agreed with Satanove J. that the processing and trade of eulachon oil was a unique practice that served different purposes than that of the subsistence fishery.[123] The Court stated that eulachon was "processed in a special way into a different product" that was valued as a preservative – unlike any other fish resource.[124] The Court held that the distinction made by Satanove J. between the eulachon fishery and other marine resources was not an "arbitrary or unprincipled one".[125] Thus, Satanove J. did not err in holding that this distinct practice does not entitle the appellants to a modern right to fish all species for commercial sale.[126] Further, the Court of

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[117] BCSC Reasons, paras 519-531 (AR Vol I Tab 2 pp 175-178).
[118] AF para 93.
[119] BCCA Reasons, paras 59, 62 (AR Vol I Tab 5 pp 214-215).
[120] BCCA Reasons, paras 62-63 (AR Vol I Tab 5 pp 215-216).
[121] BCCA Reasons, para 65 (AR Vol I Tab 5 p 216).
[122] BCCA Reasons, paras 31-32, 58 (AR Vol I Tab 5 pp 204-205, 214).
[123] BCCA Reasons, paras 42-43 (AR Vol I Tab 5 p 209).
[124] BCCA Reasons, para 43 (AR Vol I Tab 5 p 209).
[125] BCCA Reasons, para 43 (AR Vol I Tab 5 p 209).
[126] BCCA Reasons, para 31 (AR Vol I Tab 5 pp 204-205).

Appeal agreed that there was no pre-contact practice that was integral to Coast Tsimshian society that could serve as the basis of a modern commercial fishing right.[127]

51. Finally, the Court of Appeal rejected the appellants' arguments that the Crown's actions during the reserve creation process created an obligation to provide them with access to the commercial fishery.[128]

PART II – RESPONDENT'S POSITION ON QUESTIONS IN ISSUE

52. In complete accordance with the three-step *Van der Peet* test, which was explicitly affirmed by the Court in *Sappier*, the Court of Appeal properly upheld Satanove J.'s analysis in:

a. characterizing the Aboriginal right claimed by the appellants (a right to fish on a commercial scale) at the outset of the analysis based on the pleadings and the appellants' conduct of the trial;

b. identifying the relevant Coast Tsimshian pre-contact practice with the degree of specificity required to capture the "Aboriginal" component essential to establishing an Aboriginal right under s. 35 of the *Constitution Act, 1982*; and

c. declining to consider different rights which were neither pled nor raised at trial until the evidentiary stage of the proceedings were complete.

53. The Court of Appeal also properly upheld Satanove J.'s finding that, in the reserve creation process, the Crown's expressed intention was *not* to provide preferential access to commercial fishing, so that no obligation arose to provide the appellants with such a preference.

PART III – ARGUMENT

I. NO DECLARATION OF COMMERCIAL FISHING RIGHTS OR OTHER KINDS OF FISHING RIGHTS IS WARRANTED IN THIS CASE

54. Contrary to the argument presented by the appellants, the Court of Appeal correctly held that this Court's decision in *Sappier* has not rejected either the structure or substance of the test in *Van der Peet* for assessing an Aboriginal rights claim.[129] Rather, this Court expressly affirmed that test:

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[127] BCCA Reasons, para 48 (AR Vol I Tab 5 p 211).
[128] BCCA Reasons, para 78 (AR Vol I Tab 5 p 221).
[129] AF paras 52-54; BCCA Reasons, para 37 (AR Vol I Tab 5 p 207).

a. First, identify the precise nature of the applicant's claim to an Aboriginal right;[130]

b. Second, determine whether the applicant has proved: (1) the existence of the pre-contact practice advanced as supporting the claimed right and (2) that this practice was integral to the Aboriginal society's pre-contact way of life;[131]

c. Finally, determine whether the claimed modern right has a reasonable degree of continuity with the integral pre-contact practice. In other words, is the claimed modern right a logical evolution of the pre-contact practice?[132]

55. Satanove J. correctly began her analysis by ascertaining the particular Aboriginal right in issue from the pleadings and the appellants' conduct of the trial.

56. At the second stage, *Sappier*, in clarifying and refining the concept of "culture" to focus on the pre-contact way of life,[133] did not require Satanove J. to define the relevant pre-contact practice in the extremely broad terms advocated by the appellants. To define the practice as "fishing for consumption, potlatch exchange and trade,"[134] in the face of the finding that the only large-scale pre-contact trade by the Coast Tsimshian was in eulachon oil harvested at Nass Bay would be to miss the point that Aboriginal rights are specific, not general. In *Sappier*, Bastarache J. explicitly adopted the reasoning of Lamer C.J. in *Van der Peet* that Aboriginal rights must be defined with specificity, in a manner that captures the "Aboriginal" component.[135] As Lamer C.J. explained, unlike most rights, which are general and universal, Aboriginal rights are held by Aboriginal people *because* they are Aboriginal.[136] Thus the test for Aboriginal rights must identify the pre-contact practices, traditions and customs that help to define the way of life of the claimant's particular pre-contact society.[137]

57. The pre-contact Coast Tsimshian practice of harvesting, processing and trading eulachon oil cannot logically evolve into a right that encompasses practices that were not integral to the pre-contact society. Having failed to prove the practice they pled in support of their claim to a commercial fishing right, i.e., widespread trade in fish harvested throughout the territory they

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[130] *Sappier*, para 20.
[131] *Sappier*, paras 22-23; *Mitchell v M.N.R*, [2001] 1 SCR 911, 2001 SCC 33, paras 26, 40, 51.
[132] *Sappier*, para 48; *Van der Peet*, para 63; *Mitchell*, para 12; *Marshall; Bernard*, paras 25-26, 50.
[133] *Sappier*, para 45.
[134] AF para 61.
[135] *Sappier*, para 22.
[136] *Van der Peet*, paras 18-21, 31, 44.
[137] *Sappier*, paras 22, 24; *Van der Peet*, para 43-44.

occupied, the appellants' argument that they are nonetheless entitled to a general right to fish commercially cannot be sustained. Trading in fish or fish products other than eulachon oil was *not* integral but was "low volume, opportunistic, irregular, for food, social and ceremonial purposes and incidental to fundamental pre-contact Coast Tsimshian kinship relations, potlatch and ranked society".[138]

58. The appellants also argue that, although Satanove J. rejected their claim to an Aboriginal right to fish for commercial sale, she should have granted them declarations to rights to fish for sale on a lesser scale and/or for FSC purposes. This argument lacks merit. They claim that the practice of exchanging fish at potlatches supports a modern Aboriginal right to harvest all kinds of fish throughout their territories for sale "at a moderate level".[139] They did not plead this right and they use the phrase "at a moderate level" for the first time in this Court. It would be highly prejudicial to the Crown to allow the appellants to raise new issues that were not pled and, thus, were not the subject of adjudication. In any event, fishing various species for consumption and for social and ceremonial (potlatch) purposes does not translate or evolve into a similarly general right to fish for sale at a "moderate" level or any other.

59. It is not unreasonable, as the appellants argue, to require claimants of Aboriginal rights to articulate fully the particular right(s) to be adjudicated, the manner in which those rights were infringed,[140] and the remedy that they seek. Like all plaintiffs in civil proceedings, Aboriginal rights claimants must properly articulate their claims.

A. The Appellants' Claim Was Correctly Characterized As A Claim To Commercial Fishing Rights Alone

1. Characterization of the claimed right remains the first step of the s. 35 analysis

60. Satanove J. properly began her analysis by examining the nature of the right being claimed.[141] As this Court established in *Van der Peet* and re-affirmed in *Sappier*, "[t]he first step is to identify the precise nature of the applicant's claim".[142] She correctly concluded that the only right that the appellants claimed was a right to harvest and sell fish resources and products in their claimed

[138] BCSC Reasons, para 496 (AR Vol I Tab 2 p 168).
[139] AF paras 2, 49, 108-109, 136(b).
[140] See for example *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73, para 36.
[141] BCSC Reasons, para 86 (AR Vol I Tab 2 p 43).
[142] *Sappier*, para 20.

territories on a scale akin to commercial.[143] She reached this conclusion on the basis that the pleadings and the parties' conduct of the trial invoked the right to harvest for the purpose of commercial sale, and not rights to fish for sale on a lower scale or for FSC purposes. [144]

61. Relying on this Court's decision in *Mitchell*, Satanove J. stated that "[t]he focus in this step is to ascertain the true nature of the claim, not to assess the merits of the evidence offered in its support".[145] In *Mitchell*, McLachlin C.J. pointed out that "[b]efore we can address the question of whether an aboriginal right has been established, we must first characterize the right claimed. … At this initial stage of characterization, the focus is on ascertaining the true nature of the claim, not assessing the merits of this claim or the evidence offered in its support."[146] The reason why it is important to begin the analysis in this fashion is, as Lamer C.J. said in *Van der Peet*:

> …in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support.[147]

62. Since *Van der Peet* was a regulatory prosecution, there were no formal pleadings relating to the defence based on the claim to an Aboriginal right. Instead, the Court examined the actions constituting the offence charged, as proven by the Crown in its case, the legislation creating the offence and the practice, custom or tradition the applicant invoked to establish the right.[148]

63. Characterizing the claim in a civil Aboriginal rights case is essentially the same process as in a regulatory prosecution except that, in the civil process, the pleadings are the source of the factors that guide a court's characterization of the claimed Aboriginal right. In place of the *actus reus*, the nature of the action that the plaintiff claims can be done pursuant to an Aboriginal right is defined by the right claimed and the relief sought in the pleadings. The pleadings will necessarily also set out the ancestral practice, custom or traditions invoked to establish the right and the governmental legislation or action alleged to infringe the right.[149] Relying on pleadings to characterize the claimed right

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[143] BCSC Reasons, para 111 (AR Vol 1 Tab 2 p 52); BCCA Reasons, para 15 (AR Vol I Tab 5 p 195).
[144] BCSC Reasons, paras 90, 102, 105, 107 (AR Vol 1 Tab 2 pp 44, 49-51); BCCA Reasons, para 62 (AR Vol I Tab 5 pp 215-216).
[145] BCSC Reasons, para 86 (AR Vol I Tab 2 p 43).
[146] *Mitchell*, para 14.
[147] *Van der Peet*, para 51.
[148] *Van der Peet*, paras 51, 53.
[149] *Van der Peet*, paras 52-53; *Cheslatta Carrier Nation v British Columbia*, 2000 BCCA 539, 193 DLR (4th) 344.

accords with the purposes of pleadings, which are to: define the issues, give the opposing parties fair notice of the case to meet, provide the boundaries and context for effective pre-trial case management, the extent of disclosure required, and the parameters or necessity of expert opinion, and, once the trial has started, allow the trial judge to control the trial process effectively.[150]

64. Purporting to rely on *Marshall; Bernard* and *Sappier*, the appellants say that Satanove J. should only have characterized their right *after* making her findings of fact about the nature of their ancestors' fishing practices.[151] They say that Satanove J. should have analyzed their claim solely with reference to the evidence led of their ancestral way of life. Put another way, they urge the Court to characterize the claimed right without reference to their pleadings.[152] Thus, they completely ignore the first step in the analysis.

65. Satanove J.'s analysis was consistent with that of this Court in *Marshall; Bernard* and, as set out above in paragraph 60, in *Sappier*. Contrary to the appellants' submissions,[153] the decision in *Marshall; Bernard* did not modify the *Van der Peet* test for proving Aboriginal rights.[154] In *Marshall; Bernard*, the Court observed that "[d]ifferent aboriginal practices correspond to different modern rights."[155] The Court then noted that the only claim was to Aboriginal title, and stated that "[t]he question is whether the practices established by the evidence, viewed from the aboriginal perspective, correspond to the core of the common law right *claimed*"[156] (emphasis added). In other words, the Court first characterized the right claimed and then considered whether the proven pre-contact practice supported that claimed right, just as Satanove J. did here.

2. The Appellants only claimed a commercial fishing right

66. Satanove J. properly found that the appellants' pleadings and the manner in which they led their case did not raise any kinds of fishing rights other than a right to fish for the purpose of

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[150] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, para 76; *Whiten v Pilot Insurance*, [2002] 1 SCR 595, 2002 SCC 18, para 87; *Rodaro v Royal Bank of Canada* (2002), 59 OR (3d) 74, 22 BLR (3d) 274 (CA) paras 60-61; *Keene v British Columbia (Ministry of Children and Family Development)*, 2003 BCSC 1544, 20 BCLR (4th) 170, paras 27-29; *Canadian Bar Association v British Columbia*, 2008 BCCA 92, 290 DLR (4th) 617, paras 59-60, leave to appeal ref'd, 32600 (July 31, 2008).
[151] AF paras 47, 57.
[152] AF paras 47, 57, 65.
[153] AF paras 3, 47, 53, 65.
[154] *Marshall; Bernard*, paras 38-39, 58, 60.
[155] *Marshall; Bernard*, para 53.
[156] *Marshall; Bernard*, para 60; see also para 48.

unrestricted commercial sale.[157] If the appellants wanted to raise other fishing rights, they should have done so in their pleadings. Contrary to the appellants' submission, their pleadings, read as a whole, do not address other fishing rights, either directly or as rights that are necessarily included in the claimed right to harvest fish for the purpose of commercial sale.

67. The appellants defined commercial sale as "exchange of fish resources for money, goods or services, on a large scale."[158] In support of the claimed right, in their ASOC, the appellants asserted an integral ancestral practice of trade in fish to obtain goods, develop their economy and accumulate wealth.[159] Notably, they now rely on a different practice, potlatch exchange, to support their current submission that they have a right to fish for moderate sale.[160] The ASOC does not assert either a right to fish for moderate sale or point to the potlatch as a practice that supports such a right.

68. That the focus of the claim was on commercial fishing rights is highlighted by the alleged infringements, which centred on restrictions on commercial fishing.[161] The appellants accurately state that the phrase "to sustain their communities" occurred within their ASOC. However, when asked what was necessary to enable them to do so, they responded that they "require enough Fisheries Resources which, when converted to money, will enable the communities to develop and maintain a *prosperous economy*,"[162] which is difficult to distinguish from a commercial right. The relief sought is similarly enlightening, again focused on commercial fishing rights.[163] In accordance with the pleadings, the trial preparation, including the discoveries and terms of engagement of expert witnesses, specifically related to the claimed commercial fishing right.[164]

69. The appellants' conduct of the trial is also inconsistent with their attempt to retroactively recast their pleadings as including a "lesser right" to fish for sale on a moderate scale. The appellants' opening and their evidence centred on a commercial fishing right.[165] As noted by Satanove J., "neither party led evidence regarding any pre-contact practice of sustaining the community through trade on any scale" and, although evidence touched on FSC fishing, it "was never proffered or

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[157] BCSC Reasons, paras 104, 110-111 (AR Vol I Tab 2 pp 50, 52).
[158] Particulars, para 54(d) (AR Vol II, Tab 10 p 134).
[159] BCSC Reasons, paras 93-95 (AR Vol I Tab 2 pp 45-46); ASOC, paras 28, 44-45 (AR Vol II Tab 14 pp 195, 199-200).
[160] AF para 108.
[161] ASOC, para 71 (AR Vol II Tab 14 pp 206-208).
[162] Particulars, para 57(c) (AR Vol II, Tab 10 p 140).
[163] BCSC Reasons, para 97 (AR Vol I Tab 2 pp 46-47); ASOC, para 95 (AR Vol II Tab 14 pp 214-215).
[164] See notes 14 and 15 above and accompanying text.
[165] See notes 16 and 17 above and accompanying text.

received as relating to a separate claim".[166] The appellants' own evidence suggests that there was no infringement of any FSC fishing right.[167] Even in their final written argument, the appellants did not argue that any right other than a commercial fishing right had been infringed.[168]

70. Allowing the appellants to raise rights that were not pled after completion of the evidentiary portion of the trial would be irreparably prejudicial. The respondent had no opportunity to test the appellants' evidence to refute or delimit the scope or content of those other rights, including such matters as the species and quantity of fish involved and the times and locations at which the rights may be exercised. Even now, the question of what constitutes a right to fish for moderate sale remains entirely undefined.

71. The appellants' assertion that sustaining the community through trade on a smaller scale was addressed in Canada's examinations for discovery and Canada's opening at trial is patently unsustainable. The materials on which the appellants rely relate exclusively to fishing on a commercial scale.[169] The only reference to sustaining the community was made in the context of submissions about the inherent economic uncertainty of commercial fishing such that even a right to fish all species for commercial purposes may not be sufficient for the appellants to "sustain their communities based on commercial fishing activities."[170] The evidence of Canada's expert witness that subsistence fishing was integral to the appellants' ancestors' way of life was by way of explaining the absence of a pre-contact practice of trade in fish resources.

72. After 125 days of trial, having reviewed the pleadings in detail and having heard all of the evidence, Satanove J. knew that the real issue was a claim to commercial fishing rights alone. She properly declined to consider different rights.

B. Large Scale Trade In Fish Was Not Integral

73. The second step in the *Van der Peet* analysis is to determine whether the evidence establishes the existence of the pre-contact practice relied upon and whether it was integral to the pre-contact Aboriginal culture.

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[166] BCSC Reasons, paras 102, 107 (AR Vol I Tab 2 pp 49-51).
[167] See notes 104 and 105 above and accompanying text.
[168] BCSC Reasons, para 87 (AR Vol I Tab 2 p 43).
[169] AF para 94 and all citations therein.
[170] Attorney General of Canada Opening Submissions, 20 Nov 06, pp 51:37 to 53:23 (AR Vol. III Tab 18 pp 2-4).

1. The Appellants did not prove the pre-contact practice upon which they relied

74. As Satanove J. stated, "[t]he specific activity relied upon by the [appellants] to support their Aboriginal right is trading in Fish Resources and Products on a scale akin to commercial."[171] In their Amended Statement of Claim, the appellants said the Coast Tsimshian had an integral pre-contact practice of trading all species of fish, shellfish and aquatic plants as well as products processed from them, harvested throughout their tribal territory, which included all of the coastal area of northwest British Columbia shown on the Appendix A map.[172] They framed their claim in the same way in their opening: "So we say that the evidence will demonstrate that the whole of the territory was used for exploiting fisheries resources and that the society was heavily dependent on a broad range of fisheries resources for consumption and trade."[173]

75. The appellants submitted in final argument that the evidence they had led, including the expert evidence, proved that practice.[174] Satanove J. disagreed.[175] She found that their large-scale pre-contact trading practices relating to fish were not broad at all, but were restricted to eulachon harvested and processed into oil in the late winter at the mouth of the Nass River.[176] She found that Coast Tsimshian pre-contact trading in other species of fish resources and products was not integral; it was "low volume, opportunistic, irregular, for FSC purposes and incidental to fundamental pre-contact Coast Tsimshian kinship relations, potlatch and ranked society."[177]

2. Exchange of eulachon oil was a unique practice

76. The facts found by Satanove J. amply justified her determination that the exchange of eulachon oil by the Coast Tsimshian was a practice separate from the exchange of other fisheries resources and products. In the Coast Tsimshian way of life, trade in eulachon oil played quite a different role than exchange of other fish and fish products.

77. Generally speaking, the Coast Tsimshian fished at various times of the year throughout the areas controlled by their various Houses, or by all of the Houses in common, for subsistence and for

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[171] BCSC Reasons, para 275 (AR Vol I Tab 2 pp 101-102); BCCA Reasons, para 36 (AR Vol I Tab 5 pp 206-207).
[172] ASOC, paras 22, 28-29, 32 (AR Vol II Tab 14 pp 194-196).
[173] Plaintiffs' Opening Submissions (Written), 20 November 2006, para 40 (ACGR Vol I Tab 2 p 12); Plaintiffs' Opening Submissions, 20 Nov 06, p 15:25-29 (ACGR Vol I Tab 6 p 141); see also pp 3:42 to 4:19, p 4:40-44, p 13:16-19, pp 13:44 to 14:12, p 16:17-25, pp 16:40 to 17:05, p 18:25-38; p 18:39-45 (ACGR Vol I Tab 6 pp 129-130, 139-140, 142-144).
[174] BCSC Reasons, paras 385, 387 (AR Vol I Tab 2 pp 134-135).
[175] BCSC Reasons, para 487 (AR Vol I Tab 2 p 166).
[176] BCSC Reasons, para 232, 485, 495 (AR Vol I Tab 2 pp 88, 165, 168).

potlatch exchange. The Coast Tsimshian needed to preserve large quantities of fish and fish products to survive the winter and for social and ceremonial use, which mostly took the form of potlatches. By and large, Coast Tsimshian communities potlatched among themselves, *inter alia*, to assert and affirm control over House resource territories. Salmon was common to all the Aboriginal communities on the Northwest coast and so was not in demand as an item of inter-community exchange. Exchanges of fish and fish products beyond the social/ceremonial context occurred only incidentally, in rare times of famine.[178]

78. On the basis of these findings, Satanove J. properly applied the *Van der Peet / Sappier* test[179] in concluding that trade of fish beyond the social and ceremonial context was not integral to the distinctive way of life of the Coast Tsimshian.[180] As the Court of Appeal noted, her conclusion mirrored that of this Court in *NTC Smokehouse* that sales of salmon by the Sheshaht and Opetchesaht, that were "few and far between", and exchanges at potlatches and other ceremonial occasions that were incidental to those occasions, were not integral to their pre-contact societies.[181] Her conclusion also mirrors that of this Court in *Van der Peet* that exchange of salmon that was incidental to fishing for food or was part of the interaction of kin and family did not have the independent significance to ground a claim for an Aboriginal right to exchange fish for money or other goods.[182]

79. By contrast, harvesting, processing and exchanging eulachon oil occurred in quite a different context. Members of the Coast Tsimshian travelled to the mouth of the Nass in the late winter when the eulachon were available for a few weeks. They, along with the Nisga'a, Tlingit, Haida and other Aboriginal groups harvested eulachon.[183] The Coast Tsimshian rendered the eulachon into oil. This was a luxury, exotic, specialized, highly valued product, which the Coast Tsimshian traded in large volumes.[184] Unlike salmon, halibut, etc., eulachon oil was prized for its preservative purposes.[185] They also took away oil and dried eulachon for their own consumption and social and ceremonial

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[177] BCSC Reasons, paras 495-496 (AR Vol I Tab 2 p 168).
[178] BCSC Reasons, paras 322, 427-428, 430, 436, 463 (AR Vol I Tab 2 pp 115, 147-149, 158).
[179] *Sappier*, para 40.
[180] BCSC Reasons, para 495 (AR Vol I Tab 2 p 168).
[181] *R v NTC Smokehouse Ltd.*, [1996] 2 SCR 672, para 26.
[182] *Van der Peet*, paras 86-88.
[183] BCSC Reasons, paras 222, 250 (AR Vol I Tab 2 pp 85-86, 93-94).
[184] BCSC Reasons, paras 347, 351-352 (AR Vol I Tab 2 pp 122-124).
[185] BCCA Reasons, para 43 (AR Vol I Tab 5 p 209).

purposes.[186] Satanove J. concluded that the rendering of eulachon oil for exchange was a unique ancestral practice that was integral to their way of life.[187]

3. Sappier has not changed the way in which pre-contact practices must be delineated

80. The appellants argue that Satanove J. defined their fishing practices too narrowly. They say that *Sappier*, along with *Marshall; Bernard*, changed this Court's analysis so that Satanove J. should have defined the basic practice as "harvesting fish". [188] They say that she should then simply have delineated the various uses for the fish as "consumption, potlatch exchange and trade", despite having found that the only large-scale trading pre-contact practice of the Coast Tsimshian was in eulachon oil harvested at the late winter gathering at Nass Bay.[189]

81. *Sappier* refined the concept of Aboriginal culture and elaborated on the analysis of integrality,[190] but nothing in *Sappier* supports the appellants' proposition that Satanove J. should have defined their relevant pre-contact practice to be "harvesting fish". Ironically, far from suggesting that pre-contact practices should be less specifically defined, as the Court of Appeal noted, Bastarache J. expressly disapproved of such an approach as being too general. First, he *narrowed* the scope of the right claimed because the practice of "harvesting wood" lacked sufficient specificity to apply the *Van der Peet* analysis that he had just re-affirmed.[191] He criticized the respondents in *Sappier* for leading evidence about the importance of wood as opposed to the relevant pre-contact practices upon which they relied, and specifically instructed that Aboriginal rights are "not generally founded upon the importance of a particular resource."[192]

82. Second, he said that characterizing the claimed right as a right to harvest timber for personal use was also too general.[193] That Bastarache J. then identified a single practice of harvesting wood for domestic purposes does not dictate that Satanove J. should have identified a single practice of harvesting fish for the diverse uses proposed by the appellants. Bastarache J. described the practice in that case based upon the findings of fact that wood was put to many different uses that collectively

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[186] BCSC Reasons, para 225 (AR Vol I Tab 2 p 86); BCCA Reasons, para 42 (AR Vol I Tab 5 p 209).
[187] BCSC Reasons, paras 485, 495, 499 (AR Vol I Tab 2 pp 165, 168-169); BCCA Reasons, paras 28, 30, 36, 38, 43 (AR Vol I Tab 5 pp 202-204, 206-209).
[188] AF paras 60, 62-63.
[189] AF paras 2, 12, 39, 61, 63, 64, 89, 106.
[190] *Sappier*, paras 40, 44-46.
[191] BCCA Reasons, para 39 (AR Vol I Tab 5 p 208); *Sappier*, para 24.
[192] *Sappier*, para 21.
[193] *Sappier*, paras 20–24.

fell into the category of domestic purposes.[194] As the Court of Appeal stated, "the facts of each case will determine the nature and breadth of the practice…in question".[195] Depending on the facts, which include the important context of the society's way of life, the description may need to include various elements, such as the time, location, purpose, species of the resource, or specific people involved in the activity. Otherwise, omission of such details may be, as the Court of Appeal said, "to mis-describe the practice".[196]

83. In the case at bar, Satanove J. carefully considered the evidence and did make findings as to the uses the Coast Tsimshian made of the fish they harvested. However, unlike the situation in *Sappier*, those uses do not all fall into the same category. Bastarache J. pointedly distinguished trade of any kind from domestic uses.[197] Satanove J. found that the Coast Tsimshian used all the various types of fish, including eulachon, for consumption and for social and ceremonial purposes,[198] but used only eulachon to make a product for large-scale trade with other Aboriginal groups.[199] To suggest, as the appellants do, that this practice should be described as fishing for trade in a way that includes various species is to greatly distort the way of life of the Coast Tsimshian.

84. The appellants also incorrectly criticize Satanove J. for examining harvesting and trading fish separately,[200] and ignoring the fact that they fished eulachon.[201] She did not consider the harvest of fish by the Coast Tsimshian in isolation from the ways in which they used the fish. Nor did she ignore the fact that the Coast Tsimshian fished eulachon or, for that matter, that they used it for consumption and at potlatches. She simply said that, as a matter of evidence, proof that the Coast Tsimshian had an integral practice of harvesting a wide variety of fish did not on its own establish that they traded those products on a large scale.[202] Were it otherwise, the outcome in *Van der Peet* and *NTC Smokehouse*, where there was ample evidence of extensive harvesting of salmon, would have been very different.[203]

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[194] *Sappier*, para 24.
[195] BCCA Reasons, para 35 (AR Vol I Tab 5 p 206).
[196] BCCA Reasons, paras 34-35, 37-38 (AR Vol I Tab 5 pp 205-208). See also: *R v Adams*, [1996] 3 SCR 101, para 30; *R v Powley*, [2003] 2 SCR 207, 2003 SCC 43, para 19; *Sappier*, paras 22, 45.
[197] *Sappier*, para 25.
[198] BCSC Reasons, para 494 (AR Vol I Tab 2 pp 167-168).
[199] BCSC Reasons, paras 351, 484 (AR Vol I Tab 2 pp 123-124, 165).
[200] AF paras 67(a), 68-69.
[201] AF paras 67(b), 70-76.
[202] BCSC Reasons, para 275 (AR Vol I Tab 2 pp 101-102).
[203] *Van der Peet*, para 86 (Lamer C.J.); paras 209-214 (Heureux-Dube J. (dissenting)); *N.T.C. Smokehouse*, para 26 (Lamer C.J); paras 67-68 (Heureux-Dube J. (dissenting)).

4. None of the alleged factual errors warrant appellate intervention

85. The appellants also allege that Satanove J. made three errors of fact[204] in identifying the relevant pre-contact Coast Tsimshian practice. These allegations lack merit.

86. First, Satanove J.'s finding that "the rendering of the eulachon into oil" as an ancestral practice that brought wealth "was not inter-related with the subsistence fishing" does not contradict her finding that salmon and eulachon "formed the core of the subsistence economy".[205] The Coast Tsimshian's trade in eulachon grease was different in nature from subsistence fishing activities.[206] As the Court of Appeal stated, "…while eulachon and eulachon grease were consumed by the Coast Tsimshian, the eulachon fishery was carried out for additional purposes that were different from the subsistence harvesting of other fish".[207]

87. Next, the appellants allege that it was a palpable and overriding error for Satanove J. to conclude that it was more likely than not that the Coast Tsimshian could only fish eulachon at the Nass River with permission from the Nisga'a.[208] The expert evidence, as Satanove J. analyzed it, was an appropriate basis for this finding.[209] That evidence included the testimony of Dr. Anderson, the appellants' expert anthropologist, "to the effect that the Nisga'a regard the eulachon fishery at the mouth of the Nass as within their traditional territory and that if the Coast Tsimshian trespassed on Nisga'a territory without permission, 'they would expect to be punished.'"[210]

88. After reviewing all of the evidence referred to by both parties, the Court of Appeal was satisfied that "there was support for a finding regarding the necessity for 'limited permission' from the Nisga'a to take eulachon from the Nass River prior to contact".[211] In these circumstances, the Court of Appeal properly deferred to Satanove J.'s finding of fact.[212]

89. Even if Satanove J. and the Court of Appeal both erred in finding that the Coast Tsimshian required "limited permission" from the Nisga'a, that error was neither significant nor overriding. It

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[204] AF paras 67(c)–(e), 77–89.
[205] BCSC Reasons, paras 225, 499 (AR Vol I Tab 2 pp 86, 169).
[206] BCSC Reasons, paras 495-496 (AR Vol I Tab 2 p 168).
[207] BCCA Reasons, para 42 (AR Vol I Tab 5 p 209).
[208] AF paras 67(d), 78-80; BCSC Reasons, para 224 (AR Vol I Tab 2 p 86).
[209] BCSC Reasons, paras 219-224, 493, 500 (AR Vol I Tab 2 pp 85-86, 167, 169-170); BCCA Reasons, para 54 (AR Vol I Tab 5 p 213); see note 58 above.
[210] BCCA Reasons, para. 53 (AR Vol I Tab 5 p 213); Anderson, 14 Dec 06, p 58:2-19 (AR Vol III Tab 23 p 49); 8 Jan 07, pp 58:1 to 60:48 (AR Vol III Tab 24 pp 53-55).
[211] BCSC Reasons, para 54 (AR Vol I Tab 2 pp 31-32).
[212] *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33, paras 19-25.

would not undermine the significant factual finding that the harvest, processing and trade of Nass River eulachon oil was a unique, site-specific, ancestral practice.[213]

90. Finally, the appellants allege that Satanove J. disregarded post-contact evidence, which they say is indicative of a pre-contact trading practice.[214] Contrary to the appellants' assertions, Satanove J.'s reasons explicitly confirm her understanding of the relevance of post-contact evidence[215] and her consideration of that evidence.[216] On the basis of this review, Satanove J. concluded that the market and exchange system, created by the fur traders' subsistence needs, "is a prime example of an activity that came about 'solely as a response to European influences'".[217] Basically, the appellants are seeking to have this evidence re-weighed on appeal.

91. Post-contact trade does not necessarily establish that similar trade was an integral part of the pre-contact Aboriginal culture.[218] The specific example of post-contact trade identified by the appellants is a single passage in Captain Vancouver's Journal, which refers to one occurrence of an exchange following a chance encounter with three natives who were fishing salmon from a canoe.[219] As this Court stated with respect to similarly scant evidence in *Mitchell*, this passage, without more, does not substantiate the existence of pre-contact trade in fish.[220]

92. The appellants further argue that the trial judge disregarded evidence of inter-tribal trade in post-contact documents without analyzing whether the trade was solely in response to European influence.[221] They refer to four examples of such documents out of the extensive trial evidence on post-contact trade on the Northwest Coast. After reviewing the expert evidence, as well as copies of the historical and ethnographic source documents, the trial judge concluded that there was a dearth of references in these sources to trade in fish. This fact led to her reasonable inference that trade in subsistence goods was not a significant aspect of Coast Tsimshian pre-contact culture and not integral to their distinctive society.[222]

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[213] BCSC Reasons, para 499 (AR Vol I Tab 2 p 169).
[214] AF paras 67(e), 81-89.
[215] BCSC Reasons, paras 20, 434 (AR Vol I Tab 2 pp 19, 149).
[216] BCSC Reasons, paras 21-24, 64, 81, 354–383, 409–415,426–434 (AR Vol I Tab 2 pp 19-20, 35, 41-42, 124-133, 142-144, 147-149).
[217] BCSC Reasons, para 434 (AR Vol I Tab 2 p 149); *Van der Peet*, para 73.
[218] *Van der Peet*, paras 73, 89; *Mitchell*, paras 50-51.
[219] See para 33 above.
[220] *Mitchell*, para 50.
[221] AF para 88.
[222] BCSC Reasons, para 486 (AR Vol I Tab 2 p 166).

C. A General Commercial Fishing Right Is Not The Modern Expression Of The Pre-Contact Eulachon Oil Trade

93. The final question in analyzing whether the claimant has proven the Aboriginal right in issue asks if the claimed right has continuity with the pre-contact practice established by the evidence. This is an analysis of the degree of resemblance required between the pre-contact practice and its modern counterpart. In other words, is the right a logical evolution of the pre-contact practice in the sense that it is "the same sort of activity, carried on in the modern economy by modern means"?[223] The courts below correctly concluded that the Coast Tsimshian pre-contact practice of fishing eulachon at Nass Bay to be rendered into oil and traded could not evolve into a general right to fish any species anywhere throughout the area they inhabited for sale on a large scale.[224]

94. The appellants argue that the courts below erred in this conclusion because the Coast Tsimshian way of life included fishing for trade.[225] They also argue that their fishing rights extend to the Skeena River mainstream, although the pre-contact Coast Tsimshian did not fish there.[226] They offer no justification, beyond their flawed analysis of the delineation of the practice established in evidence (as discussed above) and bald assertion that a narrow view of the practice misses entirely the fundamental nature of their way of life and so would not "provide cultural security and continuity".[227]

95. Whether the question is framed as how the practice should be described or whether a modern day commercial fishery has continuity with pre-contact eulachon fishing and trade, the question remains: does a general right to fish commercially flow from pre-contact fishing for eulachon in one particular place for the purpose of trade in eulachon oil?

96. The appellants' argument entirely overlooks the finding of fact that trade in fisheries resources and products other than eulachon oil was **not** integral to the pre-contact Coast Tsimshian society. That finding necessarily means that such trade was not fundamental to their distinctive way of life.[228] That being the case, the general commercial fishing right that the appellants assert would not represent an authentic tradition "passed down" from the Coast Tsimshian society.[229] As the Court of

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[223] *Marshall; Bernard*, para 25; see also *Sappier*, para 48; *Van der Peet*, para 63.
[224] BCSC Reasons, para 501 (AR Vol I Tab 2 p 170); BCCA Reasons, para 48 (AR Vol I Tab 5 p 211).
[225] AF paras 105-107.
[226] AF paras 111-112.
[227] AF para. 76.
[228] BCSC Reasons, para 495 (AR Vol I Tab 2 p 168).
[229] *Van der Peet*, para 40.

Appeal correctly held, such a right would not "capture the 'aboriginal specificity' of the practice" required to bring it within the scope of s. 35(1) of the *Constitution Act, 1982*.[230]

97. As this Court confirmed in *Sappier*, s.35(1) envisages that the prior occupation of North America by Aboriginal peoples will be reconciled with the arrival of the Europeans and with Crown sovereignty by recognizing and affirming that Aboriginal descendants may carry on the distinctive culture of their forebears. Accordingly, this protection does not apply to *all* aspects of the ancestral culture, but only to those that are integral.[231]

98. Courts must take a generous approach to matching pre-contact practices to the appropriate modern right, which means that the pre-contact practices engage the core idea of the modern right, not that the two be exactly the same in all respects.[232] The same activity may be carried out by modern means in the modern context.[233] This, however, is not what the appellants propose. Instead, they propose that they have a constitutionally protected right to carry out in a modern context precisely those activities that were *not* an integral part of their ancestors' distinctive culture. While the analysis must be generous, there is a boundary between generosity and abandonment of principle that must not be crossed. To do so would, as Binnie J. said in *Marshall 1* and McLachlin C.J. said in *Mitchell*, confuse generosity with "a vague sense of after the fact largesse".[234]

99. Also worthy of note is that the appellants' claim to commercial fishing rights stretches beyond the areas where the Coast Tsimshian fished, to the Skeena mainstream.[235] Their argument that their right should logically evolve beyond the traditional fishing sites entirely fails to take into account that the salmon in the Skeena mainstream migrate through and to areas traditionally fished by other Aboriginal communities.[236] As Cory J. stated in *Nikal*, the "rights of one…group are necessarily limited by the rights of another."[237]

100. There is no merit to the appellants' assertion that refusing them a declaration that they have general commercial fishing rights will "leave them without any legal recognition and protection of

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[230] BCCA Reasons, para 38 (AR Vol I Tab 5 pp 207-208); see also *Sappier*, para 22.
[231] *Sappier*, para 22.
[232] *Marshall; Bernard*, para 50.
[233] *Marshall; Bernard*, para 25; *Sappier*, para 48.
[234] *R v Marshall (Marshall 1)*, [1999] 3 SCR 456, para. 14; *Mitchell*, para. 39.
[235] AF paras 111-112.
[236] Vigers, 19 Feb 07, pp 36:34 to 37:36 (ACGR Vol II Tab 13 pp 12-13), 21 Feb 07 pp 21:45 to 22:03(ACGR Vol II Tab 15 pp 30-31); Reece, 16 Mar 07, p 11:18-40, p 58:17-20 (ACGR Vol II Tab 18 pp 43, 48); Peacock, 1 May 07, p 4:5-39 (ACGR Vol II Tab 24 p 81), 2 May 2007 p 48:5-18 (ACGR Vol II Tab 25 p 85).

their most fundamental activity."[238] This case is a step in the process of determining the nature and scope of the constitutional protection to which they are entitled. As an aspect of reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown, the process of which is ongoing, this case is not the final word.[239] Their claims to other kinds of rights continue to be protected by the Crown's duty to consult.[240] Moreover, they have had and continue to have access to fishing for both FSC and commercial purposes through their existing fishing licences, the latter of which provide for "significant participation" in commercial fishing.

D. Satanove J. Properly Exercised Her Discretion Not To Consider Other Rights

101. Claims to other fishing rights should not be entertained by this Court. After considering the pleadings, the focus of the trial evidence, and prejudice to the respondent, Satanove J. properly declined to consider different rights.[241] Further, the Court of Appeal properly declined to interfere with her exercise of discretion, as the appellants failed to demonstrate any error in principle.[242]

102. There is no appropriate evidentiary base to decide whether the appellants have a right to fish for sale at a moderate level or the scope and content of their FSC fishing right, or whether any such rights were infringed, because these issues were not raised until after the parties had filed their final written arguments. The appellants sought no remedy in respect of any fishing rights other than a commercial right. In these circumstances, *Solosky* does not assist the appellants.[243] As stated by Dickson C.J. in *Solosky*, declaratory relief "avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each *has been raised* and falls to be determined."[244] As the Court of Appeal aptly stated, a court should not have to "piece together various obscure references in a pleading in order to discern what is being sought".[245]

103. Even if the evidence encompassed the practices that could support such other rights, absent notice that such rights were in issue, the Crown is seriously prejudiced in its defence. The Crown was not able to respond adequately on the existence of those rights, nor was its evidence on infringement

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[237] *Nikal*, para. 92.
[238] AF para 7.
[239] *Delgamuukw*, para 186; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, paras 11, 40.
[240] *Little Salmon*, para 102.
[241] BCSC Reasons, paras 91-111 (AR Vol I Tab 2 pp 44-52).
[242] BCCA Reasons, paras 62-63 (AR Vol I Tab 5 pp 215-216).
[243] AF para 103.
[244] *Solosky v Canada*, [1980] 1 SCR 821, p 830 (emphasis added).
[245] BCCA Reasons, para 65 (AR Vol I Tab 5 p 216).

and justification directed to those rights.[246] In the result, if the Court accedes to the appellants' request, it would be deciding complex issues on the basis of an incomplete evidentiary record.[247]

104. Further, declarations of such rights should also be denied because, even now, the appellants allege no specific infringements to the additional rights they claim. On the contrary, as set out above in paras. 42 and 43, the evidentiary record suggests no inadequacy in the appellants' opportunities to fish for FSC purposes. As the British Columbia Court of Appeal pointed out in *Cheslatta*, a declaration of an Aboriginal right should not be made in the absence of a pleading of an infringement.[248] Parties other than the respondent, such as other parties who fish in the area or companies whose activities may affect the fishing resource, "might find themselves prejudiced by a general declaration of the kind sought here…and would be obliged to seek clarification or refinement of its terms once a real dispute arose".[249]

105. In the circumstances present here, s. 10 of the *Law and Equity Act* adds nothing to the appellants' argument. Although s. 10 confirms a judge's broad equitable jurisdiction, it is still limited to claims "properly brought forward".[250] The rights the appellants now claim do not meet this criterion. They are not, as the appellants suggest, "subsumed" in the claim to rights to harvest and sell fish on a commercial scale. For example, they rely on a different practice to support their newly claimed right to fish for sale at a moderate level (potlatch exchanges) than they pled in support of the commercial fishing right.[251]

106. Finally, nothing in *NTC Smokehouse* or *Gladstone* required Satanove J. to consider both the claimed commercial fishing right and different fishing rights that were not specifically pled. The appellants misinterpret those cases in arguing that this Court required a two-stage approach. The approach in those cases was a product of the difficulty in characterizing the claim in the particular circumstances. Because the impugned regulation prohibited the accused from selling *any* fish, and the accused had sold or attempted to sell large quantities, this Court found that two different characterizations of the claim were possible. To avoid this difficulty, they first considered whether the accused could make out the less onerous claim.[252] This Court did not purport in any way to

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[246] BCSC Reasons, paras 101-102, 106–109 (AR Vol I Tab 2 pp 48, 52).
[247] *Marshall; Bernard*, para 141.
[248] *Cheslatta*.
[249] *Cheslatta*, paras 16-17.
[250] *Law and Equity Act*, RSBC 1996, c.253, s. 10.
[251] AF para 108.
[252] *R v Gladstone*, [1996] 2 SCR 723, para 24; *N.T.C. Smokehouse*, paras 19-21.

establish an analytical template. In this case, a two stage analysis was unnecessary because the appellants only claimed a commercial fishing right.

1. Precise pleadings serve vital purposes in all civil claims

107. Notwithstanding the appellants' assertion to the contrary,[253] requiring Aboriginal claimants to specify the rights that they are claiming is entirely reasonable.[254] The rules of pleadings, and the principles upon which they are based, apply equally to Aboriginal cases.[255] In all civil actions, plaintiffs are reasonably and appropriately expected to define the issues in dispute.

108. Requiring Aboriginal claimants to precisely plead the rights they claim and the material facts underlying each right is necessary for a fair and manageable trial. Pleadings are the means of defining the dispute that is to be decided by the court. Their purpose is not only to give the opposing parties fair notice of the case they have to meet, but to permit the court to effectively manage the pre-trial and trial process. These objectives cannot be achieved if a claimant who pleads only one kind of fishing right can rely on any or all other rights that the evidence may suggest at the end of the trial.

109. If, as the appellants argue, courts must probe the evidence to make findings about any and all fishing rights that may be disclosed by the evidence, whether or not they were pled, such trials would mushroom in length and complexity. The defendant would not only have to anticipate and respond to every possible type of fishing right, but would also have to justify possible infringements of a range of unspecified rights. Such unfocused proceedings would resemble an inquiry more than a trial.

110. Moreover, requiring precise pleadings in civil Aboriginal rights cases facilitates rather than undermines reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. Precise pleadings are essential to manageable trials that resolve concrete disputes about the nature and scope of Aboriginal rights within a reasonable time frame and set out clear principles that help to establish a solid basis for negotiation. Pleadings that properly articulate the specific right being sought may also directly facilitate reconciliation by serving as a starting point for discussion. Here, if the appellants had claimed an FSC fishing right, the existence of an as yet undefined FSC right would likely have been acknowledged, and the parties could have then focused on defining the

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[253] AF paras 97–99.
[254] See para 63 above.
[255] *Delgamuukw*, paras 73–77; *Stoney Band v Canada*, 2005 FCA 15, 249 DLR (4th) 274, paras 24, 27.

scope and content of that right. Thus requiring precise pleadings accords with this Court's attempts to foster negotiation instead of litigation.[256]

111. Contrary to the appellants' suggestion, application of the normal rules of pleadings should not discourage Aboriginal rights claimants from pursuing civil actions.[257] They have been and continue to be subject to similar requirements in many types of civil proceedings, such as judicial review applications, injunction applications and proceedings before administrative tribunals. In all such proceedings, Aboriginal claimants are required to specify the nature of the right claimed and the alleged infringement of it.[258]

112. Finally, accepting the appellants' diminished view of the role of pleadings would be inconsistent with recent lower courts' salutary efforts to modernize their rules by reinvigorating the importance of precise pleadings.[259] The appellants specified the right that they claimed in their ASOC. The option remained for them to request further amendments, yet they failed to do so.

E. Potlatching Does Not Support A Right To Sell

113. The appellants ignore the cultural context of the potlatch in arguing that selling fish at a moderate level is "the same sort of activity carried out in the modern economy by modern means" as giving and receiving gifts at potlatches.[260] To say that potlatches served an "economic function" denotes nothing more than that they related in some way to the Coast Tsimshian's system of production, distribution and consumption. In the same way, the seasonal round was an "economic activity."[261] The appellants obscure the fact that potlatches and trade were distinct practices. While potlatches and feasts were the main mechanisms by which wealth was distributed, gift giving at potlatches was not trade; people did not go to potlatches expecting to exchange goods.[262] Rather, by displaying and distributing goods, the hosts validated their property rights and increased or

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[256] *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, paras 33-34; *Little Salmon*, para 93.
[257] AF paras 99-101.
[258] See for example *Haida*, para. 36.
[259] B.C. *Supreme Court Rules*, Rule 3-1(2)(a)-(c); Ontario *Rules of Civil Procedure*, Rule 25.06(1), (9); *Effective and Affordable Justice*, Report of the Civil Justice Reform Working Group to the Justice Review Task Force (B.C.), November 2006, pp v-viii, 21-22, Appendix M; Donald I. Brenner, *Civil Rules Transition Guide*, February 2010, The Continuing Legal Education Society of British Columbia, Section 2, p 2-16.
[260] AF paras 108-109.
[261] Bryan A. Garner, ed., *Black's Law Dictionary*, 9th ed. (St. Paul: West Publishing Co., 2009); Judy Pearsall, ed., *The Concise Oxford Dictionary*, 10th ed. (Oxford: Oxford University Press, 1999); AF para 8.
[262] BCSC Reasons, paras 183-184, 288 (AR Vol I Tab 2 pp 74-75, 105-106).

maintained their rank and prestige.[263] The appellants therefore are incorrect in arguing that the potlatch served the same function as sales of fish do today.[264]

II. RESERVE CREATION DID NOT GENERATE ANY DUTY TO PROVIDE PREFERENTIAL ACCESS TO THE COMMERCIAL FISHERY

114. As an alternative to their Aboriginal rights claim, the appellants rely on the honour of the Crown to establish an entitlement to priority in access to commercial fishing. In their pleadings and in the Courts below, the appellants framed their alternative argument as a breach of an alleged fiduciary duty to provide commercial fishing opportunities,[265] which argument the interveners, the Metlakatla, now intend to make.[266] Regardless of how the argument is framed, there is no Crown obligation to provide the appellants with prioritized commercial fishing access.

A. No Promise Can Be Implied Where It Is Contrary To The Crown's Expressed Intention

115. The appellants' attempt to rely on the honour of the Crown must fail. Contrary to the appellants' contention, no guarantee of access to commercial fishing was made and no such promise can be implied from the reserve creation process. In fact, the Crown manifested the opposite intention. Reserves were located in order to preserve their access to their traditional food fishery.

116. There is no principled basis on which this Court should accept the appellants' proposition that the honour of the Crown can give rise to an implied promise or undertaking where the evidence demonstrates an express intention to the contrary. While "[i]t is always assumed that the Crown intends to fulfill its promises",[267] including those it made in the reserve creation process,[268] it made no representation supporting the appellants' contention. The honour of the Crown "is always at stake in its dealings with Aboriginal peoples",[269] but nothing in the circumstances of this case justifies implying such a promise.

117. After reviewing the historical evidence, Satanove J. concluded that, "the Crown gave no promise of commercial fishing rights, exclusively or at all, to the Coast Tsimshian, nor is it reasonable

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[263] BCSC Reasons, paras. 184, 186, 288 (AR Vol I Tab 2 pp 75-76, 105-106); Lovisek Report, p. 141 (AR Vol X Tab 104 p 143).
[264] AF paras 108-109.
[265] ASOC, paras 81, 95(f) (AR Vol II Tab 14 pp 210-211, 215).
[266] Metlakatla Band Memorandum of Argument in Support of Application for Leave to Intervene, paras 26-30, 36, 40.
[267] *R v Badger*, [1996] 1 SCR 771, para 41 as cited in *Haida*, para 20.
[268] *Ross River Dena Council Band v Canada*, [2002] 2 SCR 816, 2002 SCC 54, para 65.
[269] *Haida*, para 16; *Little Salmon/Carmacks*, para 52.

for the Coast Tsimshian to rely on the allotment of their reserves as granting them such a right."[270] Satanove J.'s conclusion that there was no promise given of any special access to the public fishery is consistent with this Court's interpretation of many of the same historical documents in *Nikal* and *Lewis.*[271] At was stated by this Court, numerous historical statements show, "that the firm policy of the Crown was to treat Indians in the same manner as non-Indians with respect to the allocation of fishing grounds for commercial use."[272]

118. In *Lewis*, this Court further affirmed the conclusion of Wallace J.A. in the court below that:

> It appears to me that any obligation of the Crown to act honourably to the members of the Band is satisfied in the circumstances of this case by the location of the reserve and the application of the principles set forth in *Sparrow*. The reserve, together with the priority which *Sparrow* establishes, gives the Band members secured access to a fishery in which they have a constitutional priority. The members of the Band have a first call on the fishery harvest for sustenance and ceremonial purposes, subject only to the requirements of conservation. This proper and just result clearly vindicates the honour of the Crown.[273]

This Court thus rejected the argument that the honour of the Crown required something more.

119. The Crown consistently made explicit distinctions between the "Indian fishery" and the emerging "commercial fishery" during the reserve creation process.[274] Reserves were located to protect the marine and riverine fishing stations, from which the Coast Tsimshian fished for subsistence, against encroachment by white settlers.[275] The intention was to protect the land from which the Coast Tsimshian engaged in their traditional fishery. Almost all land identified as having been used for this purpose was established as a reserve.[276] When the reserve creation process began, there was no firmly established industrial commercial fishery. It developed contemporaneously with the reserve creation process. While the Crown knew about the participation of the Aboriginal population in the then growing industry, both as fishers and as cannery workers, it expressly stipulated that Indian participation in the commercial fishery would be on the same footing as white fishers, coming under the same general law.[277]

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[270] BCSC Reasons, para 518 (AR Vol I Tab 2 p 175).
[271] *Nikal*, paras 27–49; *Lewis*, paras 31–39.
[272] *Nikal*, paras 29, 35.
[273] *Lewis*, paras 49-52.
[274] See notes 92-94 above and accompanying text.
[275] See notes 88, 90 above and accompanying text.
[276] See note 91 above and accompanying text.
[277] See notes 82, 93 above and accompanying text.

120. Satanove J.'s factual finding that no promise was made is fatal to the appellants' position. As this Court recently stated, "[f]ailing a manifest error, an appellate court simply has no jurisdiction to interfere with the findings and conclusions of fact of a trial judge."[278] The appellants have not seriously challenged this finding, which was entirely open to Satanove J. to make based on the totality of the evidence.

121. To support their position, the appellants argue that the issue here is analogous to the implied treaty rights found in *Marshall* and in *Taylor & Williams*.[279] Obviously, there is no treaty to interpret in this case as a treaty has yet to be negotiated. Moreover, unlike in *Taylor & Williams*, the appellants here were not induced by any statements to enter into a treaty under which large tracts of land were surrendered. The historical facts are not analogous.

122. In any event, applying treaty interpretation principles in this non-treaty context would not give the result advocated by the appellants. Treaty interpretation must be realistic and reflect the intentions of both parties.[280] "The bottom line is the Court's obligation is to 'choose from among the various possible interpretations of the *common* intention [at the time the treaty was made] the one which best reconciles.'"[281] To imply a promise in the face of the expression of the opposite intention would be to engage in the type of "results oriented" reasoning that this Court has described as inappropriate.[282]

B. No Fiduciary Duty Arises Where No Promise Or Undertaking Was Given

123. The courts below also properly concluded that the Crown is not bound by any fiduciary obligation to provide the appellants with priority access to commercial fishing opportunities, in a manner that is different from the rights of other Canadian commercial fishers.[283] Satanove J's findings of fact[284] were properly fatal to the appellants' fiduciary duty claim below and the Metlakatla Band's arguments here. The factual and legal foundations necessary to create the claimed private law type of obligation are both absent.

124. The fiduciary concept is not a source of plenary Crown liability. This Court has emphasized that not every situation involving Aboriginal people and the Crown results in a fiduciary

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[278] *Galambos v Perez*, [2009] 3 SCR 247, 2009 SCC 48, para 49.
[279] AF paras 116–119.
[280] *R v Sioui*, [2009] 1 SCR 1025, p 1069.
[281] *Marshall 1*, para 14, as cited in *Mikisew Cree Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 2005 SCC 69, para 28.
[282] *Gladstone v Canada (Attorney General)*, [2005] 1 SCR 325, 2005 SCC 21, para 24.
[283] BCSC Reasons, para 525 (AR Vol I Tab 2 pp 176-177); BCCA Reasons, para 77 (AR Vol I Tab 5 p 221).

relationship.[285] In *Wewaykum*, Binnie J., writing for the Court, expressed concern about the "flood of 'fiduciary duty' claims by Indian bands".[286] Recently, in *Galambos*, this Court reconfirmed that the existence of a fiduciary obligation is primarily a question of fact,[287] as an undertaking to act in the best interests of the beneficiary with respect to a specific interest is the *sine qua non* of all fiduciary relationships.[288] Satanove J.'s finding that there was no such undertaking[289] is, once again, fatal.

125. The necessity of an undertaking for the establishment of a fiduciary relationship is a consistent theme throughout this Court's jurisprudence about fiduciary duty in the Aboriginal context. In this Court's watershed decision in *Guerin*, Dickson J. (as he then was) stated:

> I do agree, however, that where by statute, agreement, or perhaps by *unilateral undertaking*, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[290]

126. Without an undertaking, it cannot be said that the Crown has undertaken discretionary control "in a way that invokes responsibility 'in the nature of a private law duty'", which this Court has held to be essential to a fiduciary obligation in the Aboriginal context.[291] The absence of an undertaking by the Crown was central to this Court's decision in *Gladstone v Canada*, where Major J., writing for the Court, referred to the obligation of one party to act for the benefit of another as "the core" of a fiduciary relationship. In *Gladstone*, the plaintiff claimed interest on the proceeds from the sale of herring spawn on kelp seized during enforcement of the *Fisheries Act*. The claim failed, in part, because, in seizing the spawn, "[t]he Crown was not undertaking to act for the respondents' benefit but was acting for the benefit of the commercial fishery, a public benefit."[292]

127. The importance of an undertaking is amplified in the context of fishing regulation, as "Canada's fisheries are a 'common property resource', belonging to all the people of Canada. Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop the fishery on behalf of

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[284] See paras 34-35, 117 above.
[285] *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245, 2002 SCC 79, para 81; *Gladstone* (2005), para. 23.
[286] *Wewaykum*, paras 82-83.
[287] *Galambos*, para 48.
[288] *Galambos*, paras 66, 69, 75–77.
[289] See paras 35, 117 above.
[290] *Guerin v Canada*, [1984] 2 SCR 335, p 384 (emphasis added).
[291] *Wewaykum*, para 85.
[292] *Gladstone* (2005), para 27.

Canadians in the public interest."[293] Here, there was no undertaking or promise given that gives rise to any special obligation to provide the appellants with preferential access to this common resource for commercial purposes.

128. With respect to the Metlakatla's reliance on the decision of the Supreme Court of the United States in *Alaska Pacific Fisheries v United States,*[294] this Court has already concluded that the result in the *Alaska Pacific Fisheries* case is not applicable to the reserve creation process in British Columbia.[295]

129. Alternatively, in the event that the Court finds that Canada has an obligation, fiduciary or otherwise, to the appellants in relation to commercial fishing, the appellants did not set out any specific breaches of such obligation in their pleadings, evidence or submissions at trial. Accordingly, Satanove J. had neither a proper basis to find a breach of any duty, nor an opportunity to determine the strength of the Crown's arguments in defence. In any event, the appellants' significant participation in the commercial fishery and the measures that Canada has taken to enhance that participation militate against a conclusion that any breach has occurred.[296] The appellants already have "continued non-exclusive opportunities in the commercial fishery".[297]

PART IV – SUBMISSIONS CONCERNING COSTS

130. If the appeal is dismissed, Canada requests that this Court grant an Order awarding the costs of this appeal to the Crown. The general principle is that a successful party is entitled to his or her costs, and this Court has reiterated that there should be very good reasons for departing from this principle.[298] Aboriginal rights litigation is no different, as shown by the award of costs by this Court in many Aboriginal cases.[299]

131. The appellants' reliance on *Okanagan* is misplaced. *Okanagan* did not displace the general rule that costs follow the cause, and "[b]ringing an issue of public importance to the courts will not

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[293] *Comeau's Sea Foods Ltd. v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12, para 37.
[294] *Alaska Pacific Fisheries v United States*, 248 US 78 (1918); Metlakatla Memorandum of Argument, para 37.
[295] *Lewis*, para 53.
[296] See paras 39-40 above.
[297] AF para 136(c).
[298] *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38, 2007 SCC 2, para 34.
[299] See for example: *Wewaykum*, para 138; *Ermineskin Indian Band and Nation v Canada*, [2009] 1 SCR 222, 2009 SCC 9, para 203; *Little Salmon/Carmacks*, para 206.

automatically entitle a litigant to preferential treatment with respect to costs".[300] The *Okanagan* respondents were caught in a grave predicament and could not afford to proceed to trial.[301] The costs order there arose because of an "exceptional convergence of factors"[302] that "created a situation that should hardly ever reoccur".[303] The appellants are not in the same situation.

PART V – NATURE OF ORDER SOUGHT

132. The respondent requests that this Court dismiss the appeal with costs to the Crown.

133. In the alternative, if the Court allows the appeal and grants any declaration sought by the appellants, the respondent requests that this Court order that the case be referred back to the Supreme Court of British Columbia for determination of the questions of infringement and justification of any established right or breach of any obligation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, in the Province of British Columbia, this day of January, 2011.

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[300] *Little Sisters*, para 33–35.
[301] *British Columbia (Minister of Forests) v Okanagan Indian Band*, [2003] 3 SCR 371, 2003 SCC 71, para 46; *Little Sisters*, para 33.
[302] *Okanagan*, para 46. *Little Sisters*, para 33.
[303] *Little Sisters*, para 78.

PART VI – TABLE OF AUTHORITIES

Secondary Sources

Legislation

PART VII - RELEVANT STATUTORY PROVISIONS

The Constitution Act, 1982	**Loi constitutionnelle de 1982**
35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.	**35.** (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés. (2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada. (3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis. (4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.